IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 2710/2018

In the matter between:

ZELDA EKSTEEN Applicant

and

BERNIDENE VAN DER MERWE Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 2 AUGUST 2018

REASONS

I INTRODUCTION

[1] This is a typical friendly sequestration application where one relative tries his/her level best to rescue another from the jaws of creditors. In the process the court is more often than not provided

with incorrect, if not false, and/or unreliable evidence. This is a typical example.

II THE PARTIES

[2] Applicant is Mrs Zelda Eksteen, a major female person residing in Three Rivers, Gauteng. She is the mother of the respondent, Mrs Bernidene van der Merwe who is resident and employed in Sasolburg, Free State Province. Respondent is married out of community of property with Mr Barend Jacobus van der Merwe which marriage was concluded on 5 September 2015. Respondent is under debt review in accordance with the National Credit Act, 34 of 2005 ("the NCA").

III THE RELIEF CLAIMED

[3] A provisional sequestration order was granted on 14 June 2018 with return date 12 July 2018. On the return date the matter came before Molitsoane J in the unopposed motion court. I believe that, having considered the helpful Assistant Master's report to which I shall return, the learned judge postponed the application to 2 August 2018 with leave to supplement the papers. On the extended return date I became seized with the matter. Counsel, submitting that the papers were duly amplified, sought a final sequestration order.

IV THE ORDER OF 2 AUGUST 2018

[4] I refused counsel's request to grant a final order of sequestration and consequently dismissed the application and discharged the rule nisi. I indicated that my reasons would follow in due course. These are my reasons.

V SECTION 12 OF THE INSOLVENCY ACT, 24 OF 1936

[5] Section 12 of the Insolvency Act, 24 of 1936 ("the Act") reads as follows:

> "12. **Final sequestration or dismissal of petition for sequestration**
>
> (1) If at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that -
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine; and
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> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
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> it may sequestrate the estate of the debtor.
>
> (2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the

hearing for any reasonable period but not sine die." (emphasis added)

[6] It is common cause that even if all three requirements of s 12(1) have been met, the court still has an overriding discretion which may be exercised in favour of or against the applicant for sequestration. See: Bertelsmann *et al, Mars: The Law of Insolvency in South Africa,* 9th ed at p 141 and further together with authorities relied upon. In friendly sequestrations it is often accepted that the respondent is clearly insolvent and/or has committed an act of insolvency, usually by way of a letter to the applicant in accordance with the provisions of s 8(g) of the Act, indicating his/her inability to pay his/her debts. The third requirement – the advantage to creditors - then becomes the focal point in order to ascertain whether a proper case has been made out for sequestration. See: *Botha v Botha* 4457/2016 [2016] ZAFSHC 194 (17 November 2016) and the numerous judgments referred to.

VI EVALUATION OF APPLICANT'S APPLICATION

Applicant's locus standi as creditor

[7] In most cases our courts accept the version of the applicant that he/she is indeed a creditor of the respondent in an amount in excess of R100,00. In the past several courts have frowned upon bald statements of indebtedness without actual proof of a loan being granted. I had my doubts about the veracity of applicant's version when reading the founding affidavit *in casu*

and those doubts have been fortified by the evidential material relied upon and attached to the supplementary affidavit. I deal with this *infra.*

[8] As mentioned the court received a helpful report from the Assistant Master dated 5 July 2018. I accept that Molitsoane J postponed the matter with leave to supplement based on the contents of this report. I criticised the local Master's Office two years ago in *Botha v Botha supra* at paras [7] and [8] in the following words:

> " [7] The most critical requirement that is often not met is the advantage of creditors, it being the third requirement quoted *supra.* The Master's reports are not helpful at all in the vast majority of cases. It is time that the allegations of applicants in friendly sequestrations and voluntary surrender applications are considered carefully, specifically in respect of the calculations to show what dividends might be paid to concurrent creditors. The personnel of the Master's office are *au fait* with administration and sequestration costs as they on a daily basis have to consider liquidation and distribution accounts in insolvent estates presented to them for approval. They know what fees may be charged by trustees of insolvent estates, what the standard costs of auctioneers are, how Master's fees and premiums on security bonds are calculated and generally, what are the costs of advertising, bank costs, sequestration costs and other expenses.
>
> [8] I shall make calculations *infra* of the dividends that might have been payable *in casu,* based on my own experience, but it should be expected of the Master to assist the courts in each and every application for sequestration (especially friendly sequestrations) and voluntary surrender applications. Section 9(4) of the Insolvency Act stipulates that before an application for a provisional sequestration order is presented to court the Master "may report to the court any facts ascertained by him which would

appear to him to justify the court in postponing the hearing or in dismissing the petition." Clearly, the word "may" is not indicative of a peremptory provision, but our courts have always insisted on a Master's report, at least before a final order is granted. Section 4(4), dealing with voluntary surrender applications, empowers the Master to direct the applicant to cause his property to be valued by a sworn appraiser and although s 4 is quiet about the filing of a report, the Master always files reports in these applications."

[9] I noticed that more detailed and helpful Master's reports have been forthcoming since the *Botha* judgment. This is appreciated. Unlike in *Botha* the concern *in casu* is proof of the first and not the third requirement of s 12, *i.e.* whether applicant has proven that she is a creditor as defined in s 9(1) of the Act. I shall in detail deal with the first requirement contained in s 12 herein. Thereafter the second and third requirements will be considered briefly.

[10] The Assistant Master submitted that applicant failed to comply with s 12(1)(a) insofar as no documentary evidence of the loan was placed before the court. She referred to several judgments in support of that submission. I can do no better than to quote from these judgments. Conradie J stated the following in *Craggs v Dedekind and other cases* 1996 (1) SA 935 (CPD) at 937E after indicating the characteristics which friendly sequestrations share:

"He (the applicant) should, I believe, present sufficiently detailed evidence to satisfy a sceptical Court that he indeed has a claim against the respondent."

In *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (WLD) Leveson J remarked as follows at 582D-E:

"A reading of papers in these applications inevitably leads the Court to the conclusion that the averments constitute a series of fictions…… Friendly sequestrations, he said, (this is a reference to a *dictum* by Nicholas J as he then was) must be closely scrutinised by the Court for it must be satisfied that this form of sequestration has not been resorted to by design and as a device simply to bypass creditors and prevent them from enforcing their rights. The Court therefore refuses to countenance a friendly sequestration unless it is fully satisfied that there is a valid and subsisting indebtedness; that there was an underlying transaction; that the indebtedness remains and that there is clear and unequivocal proof of advantage to creditors."

In *Mthimkhulu v Rampersad and another (BOE Bank Ltd intervening)* [2000] 3 All SA 512 (N) Combrinck J required compliance with seven requisites before a friendly sequestration order should be granted. The learned judge insisted at 517 that there must *inter alia be*

"…sufficient proof of the debt in the form of a paid cheque, documentation evidencing withdrawal from a savings account or a deposit into the respondent's account at or about the time the respondent is said to have received the money" and "(r)easons must be given for the fact that the applicant has no security for the debt. A Court is naturally suspicious of an unsecured loan being made to a debtor at a time when he was obviously in dire financial straits."

[11] As mentioned, applicant is the respondent's mother. According to her, respondent's financial position is well-known to her. She lent R10 000,00 to her in October 2017, but quite surprisingly decided

to call up the loan a few months later, causing respondent to write the letter dated 12 March 2018 relied upon for purposes of s 8(g). No doubt, the foundation was laid for friendly sequestration procedure to be instigated. The letter was written to allow the parties to embark upon a scheme to obtain financial relief for respondent to the detriment of creditors. A parent who is prepared to lend money to his/her child who is in serious financial trouble would rather write off the debt instead of claiming it when the child is finding him or herself in even more dire financial straits. Notwithstanding this comment, the Act provides for such measures to be taken which are all too frequently found in friendly sequestrations. The authorities are clear: courts should closely scrutinise friendly sequestrations to prevent an abuse of the process of court and creditors from enforcing their rights. I have noticed from adjudicating numerous rehabilitation applications that concurrent creditors often fail to lodge claims. In many cases it is just not a worthwhile exercise. I explain this *infra.*

[12] Notwithstanding respondent's financial predicament and the fact that she apparently was in more serious financial trouble than a few months earlier, her mother and alleged creditor in the amount of R10 000,00 decided to demand payment of the loan, but went further and paid an amount of R67 000,00 into the trust account of her Bloemfontein attorneys to be utilised for the benefit of creditors only in the event of sequestration. (The word "only" is underlined as this is in line with applicant's emphatic instruction.) This was done in order to prove an advantage to creditors as respondent has no assets, save for a few pieces of furniture with no commercial value. This Division's Practice Directive 9.1

stipulates that all cash amounts paid by or on behalf of a respondent must be paid into the Guardian Fund and the Master has to confirm this in his/her report. The court was also alerted to this non-compliance by the Assistant Master.

[13] The allegation in the s 8(g) letter pertaining to the date of the loan is wrong. There is no proof that R10 000,00 was lent to respondent in October 2017. Applicant stated under oath in her founding affidavit that the loan was granted in October 2017, but admitted in her supplementary affidavit that a "mistake" had been made pertaining to the date. One might have accepted that a *bona fide* mistake had been made if applicant had presented proper proof of payment to respondent in August 2017 as alleged in the supplementary affidavit. Notwithstanding an opportunity being given, she failed to prove her case. When I requested applicant's counsel to indicate that applicant had provided proof of the loan to respondent in August 2017 – her latest version – he referred me to applicant's Nedbank Moneytrader bank statement attached to the supplementary affidavit. This is a statement of an investment account. According to the statement three amounts of R10 000,00 each were transferred on 1 July 2017, 19 July 2017 and 19 August 2017 respectively from the investment account to applicant's current account. Unlike counsel wanted the court to believe, there is no proof whatsoever of a loan, save for the say-so of the parties which is doubtful to the extreme. The document is proof only that applicant transferred money from her one account to the other. There is no proof that an amount was actually paid to respondent.

[14] I reiterated in several judgments, relying on those judgments referred to by the Master quoted *supra* and many others, that abuse of process is rife in applications for voluntary surrender and friendly sequestration applications. See *inter alia ex parte Cloete* [2013] ZAFSHC 45 at paras [9] – [21], *ex parte Jordaan* and similar applications, an unreported judgment of this Division delivered on 27 March 2014 at paras [15] and [16] and *ex parte Snooke* 2014 (5) 426 (FB) at paras [16] – [19]. More recently further judgments on the subject were reported, to wit *ex parte Erasmus* 2015 (1) SA 540 (GP) and *ex parte Concato and similar cases* 2016 (3) SA 549 (WCC) at paras [7] – [43].

[15] I conclude by repeating that applicant failed to prove that she is a creditor of the respondent as defined in s 9(1) of the Act. Therefore the application was dismissed and the rule *nisi* discharged. I stated that I would also deal briefly with the last two requirements of s 12.

An act of insolvency in terms of s 8(g)

[16] I reiterate what I said *supra.* When applicant allegedly called up the loan, respondent wrote the letter dated 12 March 2018 relied upon for purposes of s 8(g). The letter is obviously in line with the provisions of s 8(g) and therefore the foundation was laid for friendly sequestration procedure to be instigated. It should be approached with caution, bearing in mind the fact that friendly sequestrations are more often than not to the advantage of debtors and all those involved in the process of sequestration, but to the disadvantage of especially concurrent creditors. As time

went by the veracity of respondent's written acknowledgement has evaporated like mist before the morning sun in light of the lack of evidence referred to *supra*.

Advantage to creditors

[17] In order to prove to the court that sequestration would be to the advantage of creditors, applicant, probably assisted by her attorney, calculated that a dividend of 20 cents in the Rand would be payable to concurrent creditors once provision has been made for administration costs in the amount of R30 000,00. The reference to R30 000,00 emanates from the Free State Practice Directives and particularly Directive 9.4.1 stating that all "applications for provisional sequestration and voluntary surrender will be approached by this Court on the basis that the costs of sequestration and administration will amount to R30 000,00" (which amount may be adjusted from time to time.)

[18] In her attempt to calculate the dividend of 20 cents in the Rand payable to concurrent creditors, applicant deducted R30 000,00 from R67 000,00 and divided the balance of R37 000,00 by R182 257,78 (the total claims). I am well aware of the aforesaid Practice Directives and wish to submit that it is time for Directive 9.4.1 to be amended. Experience has taught me that taxed sequestration costs in this Division are consistently higher than R30 000,00, even when the services of only one firm of attorneys are utilised. In order to obtain more certainty I requested the Registrar and Taxing Master, Mrs Naude, to provide me with recent information in this regard. According to the last five bills of

costs taxed in 2017 in unopposed sequestration matters the allocated amounts varied between R36 013,51 and R119 813,03. In four of the five instances the fees and expenses were that of one firm of attorneys only. The taxed fees and expenses of the local attorney in the last matter (November 2017) was R25 157,01 and the correspondent's fees and expenses were taxed in the amount of R62 363,09. I requested the file in *Nedbank Ltd v LT Hancke*, case no 5830/2016 as I could not believe that the bill of costs of one firm of attorneys in an unopposed matter could be as high as the amount of R119 813,03 mentioned *supra.* I granted the provisional sequestration order in that matter and wish to emphasise that it was not a friendly sequestration, although unopposed. Counsel's fees, which included fees for consultation and drafting of the papers – generally a function of the attorney - were about R12 000,00 and the valuation fees amounted to about R54 000,00. The attorneys' total fees, including those for drawing the bill of costs, attending taxation and VAT amounted to R45 420.35. Although I accept that this application was more extensive than the normal friendly sequestration, the figures do not lie. Ironically, the same attorney from the same firm is also the attorney of record *in casu.* I have also been told that there was an approximate 10% increase in fees effectively from November 2017 and that a further increase was expected soon. In my view one can safely accept a figure of R45 000,00 as a reasonable average for one firm of attorneys' sequestration costs in an unopposed sequestration application.

[19] The applicant and respondent signed their documents in Sasolburg and I have reason to believe that two firms of attorneys feature in

this application. If that is so, the sequestration costs will be much higher than R45 000,00. The trustee's remuneration, Master's fees, premium on security bond, advertising costs, bank costs and other smaller expenses such as postages and petties must be added to arrive at the total sequestration and administration costs. If this is done the total costs might well be in excess of R50 000,00. At best for applicant and on the basis of costs in the amount of R50 000,00, the free residue would be R17 000,00 and the dividend a mere 9,3%.

[20] Contrary to the calculations made by applicant and/or her attorney, an insignificant dividend of less than 10% cannot be to the advantage of creditors. The expensive machinery of the Act should not be used to sequestrate respondent in order for concurrent creditors to be satisfied with an insignificant dividend. Respondent's creditors would be much better off if the R67 000,00 was tendered to the body of creditors in full and final settlement instead of wasting the money on legal expenses. Obviously, I cannot speak for creditors and they might not have accepted such a settlement offer, but it was at least an avenue to be explored. If not accepted, the debt review process could be proceeded with.

[21] I am not satisfied that there is reason to believe that it would be to the advantage of creditors if respondent's estate is sequestrated. Respondent holds a responsible position as conveyancing typist at an established law firm. The NCA must be adhered to. She is under debt review and that process should be allowed to proceed in the interests of creditors.

Discretion in terms of s 12

[22] I mentioned that respondent is under debt review in accordance with the provisions of the NCA, but the court was not informed as to the total claims forming part of the debt review, respondent's monthly income and expenditure, when the order for debt review was made, how much has been paid ever since the order and especially why debt review is not regarded as a solution.

[23] The NCA has been promulgated for the benefit of *inter alia* over-indebted debtors and/or persons to whom reckless credit was provided. Part D of Chapter 4 of the NCA – i.e. ss 78 to 88 – sets out in detail the steps to be taken to assist these debtors. This is a typical case for respondent to pursue her right to debt review as she has indeed done. It is not explained why this process should not be continued with, particularly as the debt falls within the ambit of the NCA. In terms of the NCA a debtor is allowed an opportunity to pay his/her debts to creditors in instalments in an organised matter through the applicable debt review and court processes. In *Cloete supra* I made the point at para [24] that all debtors, especially those with small and medium-sized estates, should as a starting point embrace the protection of the NCA and should avoid utilising the expensive machinery of the Insolvency Act in order to get rid of their creditors. It remains my viewpoint. See also the judgment of Bozalek J in *Concato supra* at paras [14] – [16].

[24] Although I am not immune to the hardship and emotional stress caused to debtors due to financial difficulties, especially in the present uncertain times, I am more so mindful of the fact that our insolvency law should not be applied to the extent that the rights of debtors take precedence over that of creditors and especially concurrent creditors. In most insolvency matters concurrent creditors suffer severely insofar as they often do not even lodge claims and rather opt to write off their claims. This was not intended by the legislature when the Insolvency Act was promulgated. Insignificant dividends are often paid out in respect of concurrent claims, but more often than not concurrent creditors who proved claims are called upon to pay contributions towards costs.

[25] Finally, and even if I could be persuaded that applicant has proven all three requisites of s 12, I would still have refused to grant a final sequestration order. The respondent's debts have accrued from her wedding ceremony in September 2015 and consequent wedding expenses *ex facie* para 7 of the founding affidavit. Her father promised to pay for these wedding expenses from the proceeds of a policy to be paid out to him, but unfortunately he died in May 2015 and could not fulfil his promise. Applicant inherited her deceased husband's entire estate, including the proceeds of all his policies. It is in my view quite logical, ethical and reasonable that applicant should have settled the wedding expenses as her late husband promised to do. In any event, I find it unreasonable that respondent's husband was also not prepared to take responsibility for these expenses. People should not be allowed to live a lifestyle beyond their means by

incurring debts and then run to the courts to assist them in getting rid of their creditors. Respondent should learn to live within her means and continue to settle her debts in terms of the provisions of the NCA.

J. P. DAFFUE, J