APPEAL COURT Case No 430/92

P S WALLACH

APPELLANT

vs

R M E WALLACH

RESPONDENT

CORAM: HEFER, NESTADT JJA et VAN COLLER DATE

HEARD: 9 NOVEMBER 1995

REASONS GIVEN IN COURT:

The above matter was argued in Court on 9 November. The attached reasons were handed in on 13 November 1995 by H H NESTADT, JA.

Case No 430/92 PS

WALLACH v R M E WALLACH

Nestadt. JA:

This is not a matter in which any particular principles of law arise for determination. We have come to a fixed, firm conclusion as to its outcome. We think it desirable that the matter be concluded as soon as possible. For these reasons we therefore propose to give judgment immediately. In doing so I shall not deal with all the arguments that were advanced before us particularly by the appellant and the respondent. I confine myself to the essential aspects of the matter.

The first question that arises is whether the application by the intervening creditor should be granted. The points argued in support of their opposition to the application for intervention by the appellant and respondent were, in the main, that the trustee by accepting payment of the sum of R660 000 from the insurer reduced the value of the estate and that the bank was responsible for this situation and that this was "a violation of the concursus" and secondly that the bank did not have a sufficient interest in the sequestration as to justify its intervention and that in any event the application was a frivolous one. There is no merit in these contentions and there is no justifiable basis for their opposition to the application for intervention. Indeed the appellant eventually conceded before us that the bank had a sufficient interest. Despite the appellant's and the respondent's arguments to the contrary I am satisfied that the papers established that the bank has a proved creditor and that it is one of the major creditors. It was faced with the situation that both the appellant and respondent were seeking to

have the sequestion order set aside. This would be the result of the appeal succeeding. In these circumstances the bank had a sufficient interest to entitle it even at this late stage to intervene with a view to opposing the appeal including the application for condonation. Of course the bank would have been bound to appreciate that this Court would not allow the appeal simply because there was no longer opposition to the appeal. But even so it was, it seems to me, entitled to seek to ensure that this did not happen. The application for intervention will therefore be granted. Whether the bank was entitled to file the voluminous papers which it did and which contributed to the application comprising some 600 pages is another matter. I return later to this aspect when dealing with what costs orders should be made. I mention now however that Mr Lazarus on behalf of the bank, quite properly conceded that at best for him the bank should only obtain a third of the costs of its affidavits.

The second issue concerns the application for condonation of the late filing or lodgment of the notice of appeal. I leave aside that there is no further application for the late lodgment of the record. In his application the appellant seeks to explain his delay of some 16 months in filing his notice of appeal. In my opinion the reasons given are entirely inadequate. The factor relied on is the fire and in particular the allegation that he only learnt of the insurance payout to the trustee in June 1992. On the strength of this it is submitted that the appellant was not in a position to file his notice of appeal earlier. This cannot be so. The appellant was bound to decide on the basis of the affidavits that were before the

Court when the final sequestion order was granted whether or not to appeal. What happened thereafter in regard to the administration of the estate is irrelevant. In other words the appellant cannot rely on his dissatisfaction with the administration of the estate to excuse his delay in appealing. Indeed the inference to be drawn is that the appellant deliberately elected to accept or to abide by the order sequestrating him. In the result there is no basis on which it can be said that sufficient cause for condonation has been shown and on this basis alone the application for condonation falls to be refused.

There is however a further and perhaps more substantial basis for refusing the application for condonation. This concerns the merits of the appeal itself. If there are no reasonable prospects of success this is a further reason for refusing the application for condonation. The pith of what the appellant and the respondent contend in this regard, ie in respect of the merits of the appeal itself, is the following. That the respondent did not have a claim against him which was due and payable, that the estate has been improperly administered, that he was or is not insolvent, that he was wrongfully induced by Mr Hacker to sign his affidavit of the 9 March 1991, that the sequestion is not to the advantage of creditors, that the fire of the 17 February 1991 and/or the subsequent fire affected the position, particularly in that the respondent's claim against the estate was thereby diminished and that the final order was obtained without the respondent's instructions because of alleged improper conduct by Hacker, or that the appellant did not know that a final order was to be taken. Here too, the argument must be rejected. It overlooks the

nature of the proceedings before us. We cannot, as was more than once pointed out to the appellant and the respondent during argument before us today, have regard to extraneous matters, to allegations which do not appear from the record before us. We therefore cannot have regard to, for example, the allegations concerning the alleged improper conduct of Hacker. Nor is the appellant's complaint that the house should have been restored rather than the insurance pay-out accepted and that the estate has been improperly administered in other respects of any relevance. Nor can the appellant be permitted to attempt to show, by means of new matter or changed circumstances, that the respondent was not a creditor or that he was not insolvent or that his sequestration would not be to the advantage of creditors. Some of the matters raised may possibly be relevant to an application which the appellant may or may not be entitled to bring to set aside the sequestration order in terms of sec 149(2). But they cannot concern us. The appellant cannot be permitted to set aside the sequestration order through the back door of an appeal. All we can do is to look at the record to which I referred. The appellant cannot argue matters unknown to and not before the court below. If, on the evidence before the court below a sequestration order was properly granted that is an end to the matter. The appeal must fail.

Looking at the matter thus it is clear that a sequestion order was properly granted. The respondent's uncontested allegations established that she was a creditor of the appellant in the liquidated sum of R400 000 which amount was due and owing; that the appellant had committed an act of insolvency in terms of sec 8(g)

and that he was insolvent and thirdly, that the sequestration was to the advantage of creditors. There is no basis on which the court a quo could exercise a discretion in these circumstances against the grant of a final order. True, the fire was referred to before the final order was granted, but it was referred to by the appellant in support of the grant of the final order, ie to show that there was no point in any further extensions being granted because the property could not be sold. The argument that the requirements of the sequestration order were not satisfied is therefore not tenable. I should add this by way of emphasis that the applicant's complaint argued before us that the respondent's allegations were not proved is without substance. The respondent's allegations in the sequestration proceedings were proved. They were not based on hearsay. They were, as I have indicated, undisputed.

The result is that finding as I do that the appeal itself would not succeed, the application for condonation must, for this further reason, be refused. The appellant and the respondent asked at one stage that the matter be referred to the Constitutional Court to enable, in the words of the respondent, her to establish her right to equality. I do not know what she means by this. I think she must be left and the appellant as well to pursue whatever remedies they consider are available to them. Certainly there is no constitutional issue before us.

I must return briefly to the question of costs. There was no prayer for costs in the application to intervene. But this does not preclude the intervening creditor from asking for costs now. The

appellant and respondent were made aware of the bank's claim for costs in counsel's heads of argument dated 18 October 1995 and there is no reason to think that either the appellant or the respondent would not have opposed the intervention had costs been claimed ab initio. Both the appellant and the respondent have made common cause in opposing the application to intervene. They have been unsuccessful in such opposition and both must therefore pay the costs of the intervening creditor subject however to two qualifications in regard to the costs of the petition and replying affidavit, namely, (i) only the costs occasioned by the opposition will be allowed.

This means that the intervening creditor will not be entitled to

any costs of the petition itself, and (ii) only one-third of the costs of the replying affidavit will be

allowed. As to the rest of the bank's costs, including those occasioned by its representation before us today, the appellant and the respondent will have to jointly pay these.

The following order is made.

(1) The intervening creditor is granted leave to intervene in the appeal.

(2) The appellant and the respondent are ordered to jointly pay the intervening creditor's costs arising out of the appellant's and respondent's opposition to the petition to intervene, subject to the following qualifications:

(a) No costs will be allowed in respect of the petition

itself.

(3) The intervening creditor will only be allowed one third of its costs in respect of its replying affidavit in the petition for leave to intervene.

(4) The appellant's application for condonation of the late lodging of the notice of appeal is dismissed.

H H Nestadt Judge of

Appeal 9 November 1995