CASE NO: 642/96
PET NO: 643/96
130/97 131/97 164/97
165/97

In the matter between:

BENTLEY SAMUEL BEIRA — PETITIONER

and

RAPHAELY WEINER — 1ST RESPONDENT

FIRST NATIONAL BANK — 2ND RESPONDENT

SHEILA IRIS BEIRA — 3RD RESPONDENT

CORAM: VIVIER, NIENABER and HARMS, JJA

HEARD: 28 MAY 1997

DELIVERED: 30 MAY 1997

J U D G M E N T

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HARMS JA

HARMS JA:

The petitioner wishes to appeal against a final order of sequestration of his estate made by De Klerk J in the Witwatersrand Local Division on 11 August 1992. A notice of appeal was lodged with the Registrar of this Court more than four years later, namely on 19 December 1996. Mindful of the fact that he had failed to comply with a number of the rules of court, and indeed with certain provisions of the Supreme Court Act 59 of 1959, the petitioner filed five petitions:

1. An application dated 18 December 1996 for condonation of the late filing of the notice of appeal.

2. A petition filed on 27 March 1997 for condonation of the late filing of the record. The record was lodged simultaneously with the petition.

3. A further petition filed on 27 March 1997 in which, on the one hand, condonation of the failure to provide security for the respondent's costs is

sought, and on the other hand, the Court is requested to waive security.

4. A petition for leave to adduce further evidence or for remitting the matter back for oral evidence on the new matter, of 6 April 1997.

5. A petition seeking leave to proceed in forma pauperis, dated 7 April 1997.

At the time of the final sequestration order (11 August 1992) the appellant had an automatic right of appeal to this Court, ie without any leave to appeal (Fourie v Drakensberg Koöperasie Bpk 1988 (3) SA 466 (A)). This right had to be exercised within 21 days (s 150(2) of the Insolvency Act 24 of 1936 read with s 21 of the Supreme Court Act 59 of 1959). The petitioner did not exercise his right but, instead, applied to the judge a quo for leave to appeal. De Klerk J, quite correctly, struck the application from the roll as an irregular proceeding and hence a nullity.

The next ill-fated step taken by the petitioner was an application for the rescission of the last-mentioned order of De Klerk J on the ground that he had not received notice of the set-down of his own application. During the course of that application his attorney advised him (on 2 March 1993) of his right of appeal and his obligation to apply for condonation for the late filing of the notice of appeal. The petitioner, for reasons not disclosed on the papers, did not follow this advice nor did he proceed with the rescission application.

Because of an amendment to s 150(1) of the Insolvency Act, the automatic right to appeal against a final sequestration order was abolished from 1 September 1993. Whether the petitioner was still entitled to file a notice of appeal without the prior leave to appeal of the court a quo or this Court (cf National Union of Metalworkers of South Africa v Jumbo Products CC 1996 (4) SA 735 (A) 740A-D) and whether petition no 1 is

for this reason alone fatally defective, need not be decided in the light of what follows. I should preface what follows by stating that the judgment is based upon the facts stated in the record and that the petitioner's gratuitous amplification during argument was discounted, as it had to be.

I propose to deal with petition no 1 purely as a petition for condonation. In that regard three dates are of importance: that of the order of sequestration (11 August 1992), the occasion when the petitioner was informed of his rights and obligations concerning an appeal (2 March 1993) and the date of petition no 1 (18 December 1996). There is no explanation on the papers for the delay between the second and the third dates. In the circumstances of this case this is fatal, even should there be prospects of success, because an application for condonation must be made as soon as it is realized that the rules have not been complied with; the petitioner is required to give a full

and satisfactory explanation for whatever delays have occurred; and the respondent's interest in the finality of the judgment is a factor which weighs with the court (cf Ferreira v Ntsningila 1990 (4) SA 271 (A) 281C-282A). And, appeals against orders for sequestration should be prosecuted with "due expedition" (Mbutuzna v Xhosa Development Corporation Ltd 1978 (1) SA 681 (A) 687A). That really disposes of the matter but because the petitioner appears in person I propose briefly to deal with the prospects of success in the proposed appeal against the sequestration order. I shall take the petitioner's original notice of application for leave to appeal as the basis of the inquiry.

The first ground of appeal concerns the locus standi of the applicant in the sequestration proceedings. The applicant was Raphaely-Weiner, a partnership of attorneys. It had a judgment in its favour against the petitioner for legal fees of R23 560,76 with interest and

costs. At the time of the trial concerning these fees the partnership of Raphaely-Weiner, to the knowledge of the trial court, had been dissolved and that was also the position during the sequestration proceedings. Because of this, the petitioner maintains that the sequestration proceedings were not competent. De Klerk J rejected the contention and held that in spite of the fact that the partnership was dissolved, "the claim remains a partnership asset and for that purpose the partnership still remains in existence". The learned Judge was clearly right: Barker & Co v Blore 1908 Ts 1156 1160-1161; Ferreira v Foucne 1949 (1) SA 67 (T) 70; Goldberg and Another v Di Meo 1960 (3) SA 136 (N) 145E-H; Kirsh Industries Ltd v Vosloo and Lindeqrue and Others 1982 (3) SA 479 (W) 484A-F; cf Van der Merwe v Sekretaris van Binnelandse Inkomste 1977 (1) SA 462 (A) 473F. In any event, two creditors with unassailable claims, each in excess of Rl million, had intervened and the sequestration

order was competent with them as applicants.

The second ground of appeal relates to the correctness and validity of the nulla bona returns relied upon by Raphaely-Weiner as reflecting an act of insolvency. According to s 8(b) of the Insolvency Act, a debtor commits an act of insolvency if a court has given judgment against him and the debtor is served with the writ of execution, and he fails upon demand to satisfy the judgment or fails to indicate to the officer disposable property sufficient for that purpose. (The other ground in s 8(b) is of no concern in this case.)

According to the returns of service (both are in identical terms) the Sheriff attempted a service at 10, 5th Street, Melville. Then, at 125 Smit Street, the writs of execution were executed personally against the petitioner. Payment was demanded and the petitioner stated that he had no funds to make payment. He was then requested whether he had any disposable assets anywhere to satisfy the

judgments and he stated that he did not have any. On the face of it the returns established an act of insolvency and it was then for the petitioner to show by clear and satisfactory evidence that the returns are impeachable (eg Van Vuuren v Jansen 1977 (3) SA 1062 (T) 1063c).

The petitioner attacks the validity of the returns. The first ground is that neither address was that of his residence or place of business. That is beside the point - s 8(b) requires personal service only and it does not state where such service has to take place. Another ground of attack is that Raphaely-Weiner was not the judgment creditor in respect of the warrants of execution, but his former wife. That is also beside the point - s 9(1) grants the right to any creditor who complies with its provisions to apply for a sequestration order and it is not required that the act of insolvency must have been committed vis-a-vis the petitioning creditor (Kerbel v Chames 1925 WLD 72 75). Other grounds may well also have

been intended, but I find no reference to them in the record of the proceedings.

In a supplementary affidavit filed in petition no 1 after the answering affidavits had been lodged, the petitioner denies that the Sheriff had asked him the questions reflected in the returns. Had they been posed, he now says, he would have pointed out disposable property with a value of about R670 000. Since the one warrant related to a judgment in excess of Rl million, the R670 000 would have been insufficient. This new evidence is also not credible. At the time of execution the petitioner refused to accept the correctness of the judgment entered against him. He in fact lodged a petition for leave to appeal against that judgment after the attempted execution. His attitude during the sequestration proceedings was that the nulla bona return had become academic because of the petition. That petition was in the event dismissed. I therefore do not believe that his belated version has any

prospect of success on appeal. In the heads of argument the petitioner raises another new point, namely the noncompliance by the Sheriff of Rule 45(3). It requires of the Sheriff to execute by proceeding to the debtor's dwelling-house or place of employment or business and to demand payment of the process. Because the return reflects an attempted service at no 10, 5th Street and not at no 10A, the petitioner's dwelling-house, the contention is that the writ is fatally defective. I shall assume in the petitioner's favour that non-compliance with Rule 45(3) may affect the validity of an attachment, but that does not mean that it affects a nulla bona return. In any event, the rule is subject to the provision in parenthesis, namely that the creditor may give different instructions. Since the issue was not canvassed, it is not known whether or not such instructions were given.

The third ground of appeal concerns the hearing before De Klerk J. In petition no 1 the petitioner blandly

alleged that the provisional order was confirmed without

him being afforded the opportunity of addressing the court.

This version was more than amplified in later affidavits:

> "I came fully prepared with books and authorities to argue why the nulla bona was defective and why the applicant lacked locus standi. I had been told by His Lordship Mr Justice Mahomed that I would be afforded the opportunity of addressing the court on these very issues. I therefore did not realise that such issues had to be amplified in writing more than 1 had already done.
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> His Lordship Mr Justice De Klerk arrived at court when I was expecting His Lordship Mr Justice Mahomed. His Lordship sat down, the matter was called whereafter His Lordship simply confirmed the order. I stood up, told His Lordship that he was the wrong Judge, (as I was expecting to appear before His Lordship Mr Justice Mahomed whom I had on two previous occasions appeared and believed that he was seized of the matter). His Lordship Mr Justice De Klerk informed me that any Judge could hear the matter, whereafter I requested an opportunity of addressing the court and dealing with the issues. His Lordship informed me that he had read the papers and thereafter His Lordship left the court. The entire hearing did not last more than a few minutes. I respectfully submit that I was denied my right

to justice and a fair and proper hearing."

His version of the events is disputed by the respondents. They say that the learned Judge did afford the petitioner a full hearing but that he did not permit irrelevancies and insisted that the argument be confined to matters necessary for the determination of the application. Their version is the more probable for especially these reasons. The learned Judge filed reasons for his order confirming the rule nisi. All the points (except the present) raised by the petitioner in his notice of application for leave to appeal were dealt with therein. Second, in the said notice the petitioner did not allege that he had not been afforded any hearing. His complaint was that he had not been afforded the opportunity "of taking the court through the papers". Those "papers" ran to 455 pages and dealt, in the main, with the petitioner's attack on the final judgments entered against him. It is

therefore likely that De Klerk J refused the petitioner the indulgence to argue what he wished. That De Klerk J was entitled to do. A litigant's right to address the court is subject to proper judicial control.

Even if I assume that the petitioner was unduly constrained in arguing his case, the question remains whether any injustice was suffered by the petitioner. Because of the nature of the proceedings — application proceedings — we are as able as the court below to assess the petitioner' s case and that brings me to the last substantial point. It is that the three creditors had conspired to ruin the petitioner financially.

These creditors did work together with the object of sequestrating the petitioner. Each had a valid and uncontestable claim. Each was entitled to payment. The petitioner did not pay. He committed at least one act of insolvency. He was commercially insolvent. He never expressed a willingness to settle his debts. Under these

circumstances a "conspiracy" to sequestrate would have been proper and lawful and there is thus also on this ground no basis for believing that an appeal has any prospect of success.

In his heads of argument the petitioner has raised another point not canvassed in the court below or in the petition under consideration, namely that the sequestration application was fatally defective because it was not accompanied by a certificate by the Master concerning security. There is no factual basis for the submission and it must be rejected. The ex parte application was lodged with the registrar of the court below on 14 May 1992 and attached to it is annexure A9, a proper certificate, dated 14 May 1992. The founding affidavit refers to it in express terms. Prima facie, therefore, the petition was "accompanied" by the Master's certificate, albeit a copy, within the meaning of s 9(3)(b).

In the result I hold that there are no reasonable prospect of success in the appeal and petition no 1 stands to be dismissed with costs. The other petitions, consequently, have become academic and are subject to the same fate. I do wish, however, to say something in regard to petition no 5, the application for leave to prosecute the appeal in forma pauperis. Assuming for the moment that in forma pauperis assistance is available to a petitioner under present circumstances, this petition is fatally defective, inter alia, because of the noncompliance with Rule 4(5). It requires of such a petition to set forth fully:

> (i) the financial position of the petitioner; (ii) "in particular", that the petitioner is unable to provide sureties, and (iii) (paraphrased) the value of his estate.

The petitioner has not complied with any of these

requirements and contented himself by referring to the fact of his sequestration. That was five years ago. No reference is made to the value of his new estate — if any. A sequestration that long ago is not evidence of current poverty.

In the result all the petitions are dismissed with costs, including the costs relating to the appeal.

L T C HARMS JUDGE
OF APPEAL

VIVIER JA) concur
NIENABER JA)