CASE NO.: A 171/96

COMMERCIAL BANK OF NAMIBIA versus
PIETER JOHAN MYBURGH & CATHERINA H. MYBURGH

HANNAH J.

1996/08/16

SEQUESTRATION:

Criminal proceedings pending against the debtor arising out of same facts relied on in seguestration proceedings. In such circumstances it would be proper to refuse provisional order of sequestration or discharge such order where debtor is opposing the sequestration proceedings.

PRACTICE:

Authority to bring application lacking. Authority ratified retrospectively. Such ratification cures the original defect.

CASE NO. A 171/96

IN THE HIGH COURT OF NAMIBIA
APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

In the matter, between

COMMERCIAL BANK OF NAMIBIA

versus

PIETER JOHAN MYBURGH CATHERINA HENDRIKA MYBURGH

CORAM: HANNAH, J.

Heard on: 1996.08.09

Delivered on: 1996.08.16

JUDGMENT

HANNAH, J. : On 26th July, 1996 the applicant bank applied ex parte for an order placing the communal estate of the two respondents in provisional sequestration. The respondents, I should mention, are husband and wife married in community of property. The application

was granted and a rule nisi was issued calling upon the respondents to show cause on 6th September, 1996 why the order should not be made final. The respondents now apply to anticipate the return day in terms of section 11(3) of the Insolvency Act, No. 24 of 1936 and ask that the provisional order be discharged.

In an affidavit sworn in support of the ex parte application the applicant's credit manager, one Salomon Van der Wath, alleged that the respondents were indebted to the applicant in the sum of N$13 608 639.92. Of this sum N$272 367.19 was owed in respect of overdraft facilities granted to the first respondent. N$272 369.96 was owed in respect of various instalment sale transactions entered into by the first respondent with the applicant. N$134 660.91 was owed in respect of agreements entered into by the second respondent and the applicant. N$115 927.92 was owed in respect of a loan made to the second respondent by the applicant. N$2 298 548.40 was owed in respect of nine particular instalment sale agreements entered into by the first respondent with the applicant. And N$10 514 765.54 was owed as a result of fraud perpetrated by the first respondent on the applicant.

In addition to the large debt owed by the respondents to the applicant, Van der Wath alleged that the first respondent had other creditors with judgments or claims against him totalling N$l 280 843.11 making the total indebtedness N$14 889 483.03. As against this very substantial debt the respondents' assets, so it was alleged, totalled no more than N$8 00 000 in value, a sum which Van der Wath maintained had been generously estimated. And the respondents' predicted monthly income was no more than N$50 000. This income, it was pointed out, would not even service the interest on the respondents' liabilities which was put at N$233 000 per month. The respondents were accordingly hopelessly insolvent and it was to the advantage of the creditors if the respondent's estate were placed under sequestration. On the basis of this portrayal of the respondents' financial affairs it is not in the least surprising that a provisional sequestration order was made.

In his answering affidavit the first respondent deals in some detail with the allegations made by Van der Wath with the exception of the allegation of fraud. With regard to the fraud allegation the first

respondent states, and this is not in dispute, that on the very day when the applicant sought the ex parte order he was arrested in respect of the alleged fraud, the applicant having laid a complaint with the Prosecutor-General the previous day. The first respondent denies the allegation of fraud but says that to deal with it in his answering affidavit would prejudice him in his defence in the criminal proceedings. This can readily be understood. He has a right in the criminal proceedings not to disclose his defence in advance.

The learned judge who made the ex parte order was informed of the criminal proceedings by counsel who appeared on behalf of the applicant and so had that aspect of the matter in mind when making the provisional order of sequestration. However, what the learned judge did not know was whether the first respondent intended to deny the charges made against him and that is a matter of some relevance. Where civil proceedings and criminal proceedings arising out of the same facts are pending against a person the usual practice is to stay the civil proceedings until the criminal proceedings have been disposed of. And where such a situation arises in sequestration proceedings it has been held that it would be proper to refuse or discharge a provisional order of sequestration: Standard Bank v Johnson, 1923 CPD 303. However, whether a provisional order of sequestration will

be refused or discharged on this ground will depend on the circumstances of each case. In Du Toit v Van Rensbura 1967(4) SA 433 (C) Corbett J. (as he then was) said at p. 436 B:

> "Nevertheless, it seems to me that whether one should refuse to grant a provisional order of sequestration at this stage because of the criminal charge pending against the respondent is basically a question as to whether there is a danger that the respondent will suffer prejudice in those criminal proceedings by reason of the granting of such order."

In that case the learned judge went on to grant a provisional order of sequestration in an ex parte application where a criminal charge was pending against the respondent in respect of the very matters which formed, to some extent, the subject matter of the application. The learned judge pointed out that the Court did not know what the respondent's attitude to the application would be. It might transpire that the respondent would not seek to oppose the

application in which case there would not be any real likelihood of prejudice being suffered.

In the instant case the Court now knows that the first respondent does oppose the application and I can visualise a very real possibility of prejudice arising if the provisional order of sequestration were to remain in force and the first respondent were called upon to answer the allegations of fraud. If the applicant's case depended wholly on the fraud allegations I would therefore be inclined to discharge the provisional order. However, as Mr Lamont, for the applicant, points out the applicant's case does not depend wholly on the fraud allegations. Putting aside the alleged liability of N$10 514 765.54 arising from fraud one is still left with an alleged indebtedness of N$3 093 874.38 and taking this lesser amount Mr Lamont submits that a case of insolvency has clearly been made out and the provisional order of sequestration should not be discharged. I therefore approach the question whether the provisional order should be discharged on the basis of the applicant's allegations that the respondents are indebted to it in the sum of N$3 093 874.38.

Before analysing the first respondent's answer to the founding affidavit I will deal with a technical point taken by Mr Potgieter on behalf of the respondents. In his affidavit Van der Wath deposed that he was duly authorised to bring the application but this averment was challenged by the first respondent. In his replying affidavit Van der Wath claimed that he was authorised to bring the application and he annexed a copy resolution passed by the applicant's board of directors on 8th August, 1996 resolving that the applicant petitions for the sequestration of the respondents, authorising Van der Wath to take all necessary steps and confirming the actions already taken by Van der Wath in making the application. It would appear from this that at the time of bringing the application Van der Wath was not duly authorised to do so and Mr Potgieter submits that the proceedings were a nullity ab initio due to lack of authority which cannot be ratified retrospectively. In support of this submission Mr Potgieter relied on South African Milling Co (Ptv) Ltd v Reddv. 1980(3) SA 431 (SE) and if that case was correctly decided there can be no real doubt that

Mr Potgieter has a good point. But further research reveals that there are two lines of conflicting authority on the point in question.

As was pointed out by Conradie J. in Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another, 1994(1) SA 659 one line has its source in The South African Milling case (supra) and the principal source for the other is Baeck & Co SA (Pty) Ltd v Van Zummeren and Another, 1982(2) SA 112 (W) . In the South African Milling case Kannemeyer J. held that an objection by the opposing litigant precludes ratification of the unauthorised institution of proceedings by the purported agent because the opposing party, by objecting, acquires a right to move for the dismissal of the application on the ground of lack of locus standi. The opposing party cannot, by ratification, be deprived to his prejudice of such right. In the Baeck case Goldstone J., having noted that in reaching his conclusion Kannemeyer J. had relied on authorities to the effect that ratification cannot affect vested rights previously acquired by third parties, said the following at p. 119 H:

> "However, in the case before him, as in the case now before me, no change in the legal position between the parties had occurred between the time that the application was launched and the time when the unauthorised act was ratified. The 'right to move for the dismissal of the application on the ground of lack of locus standi' is, with respect, hardly what one would envisage as constituting a 'vested right.' Indeed, there is high authority to the contrary."

Then, having referred to Garment Workers' Union of the Cape and Another v Garment Workers' Union and Another, 1946 AD 370, the learned judge concluded that ratification of the unauthorised act of bringing application proceedings does retrospectively operate to cure the original lack of authority.

Having examined the relevant authorities, including the judgment of Conradie J. in the Merlin Gerin case (supra), I respectfully agree that the correct approach was that adopted in the Baeck case. I agree with Conradie J. when he said in the Merlin Gerin case at p. 660 D:

"The difficulty is, I venture to think, that the content of the 'right' has been incorrectly analysed. The 'right' - if it is one - is a respondent's right not to be subjected to the risk of litigating against an ostensible applicant when the latter will not be bound by orders made in the litigation, or when it is not clear that the applicant's ostensible agent has authority to conduct the litigation on its behalf. The right is the right to refuse to litigate under such prejudicial circumstances. It is the fundamental right to a fair trial. For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against.

An applicant now has two options. If he had no authority to begin with, he would attempt to defeat the remedy by obtaining authority by way of ratification and by putting proof of that before the Court. Or he might put better proof of preexisting authority before the Court. Once the applicant has done this, he will be bound by an order of costs against him. In this way, ratification would not harm but benefit the respondent, and so would unequivocal proof of preexisting authority."

Whether a litigant should be permitted to raise the question of ratification in a replying affidavit is another matter and Mr Potgieter submits that in the present case the applicant should not be permitted to raise it in this way. But #it resolves the matter in a simple, straightforward manner I can see no objection in allowing the applicant the opportunity of putting his case in order and accordingly the point taken by Mr Potgieter fails.

One other matter addressed by Mr Potgieter in additional written argument concerns the manner of proving the resolution ratifying the authority of Van der Wath. He submits that the production of a copy of the resolution is not sufficient proof. I have considered the argument advanced and, in my view, enough has been placed before the Court to warrant the conclusion that the application is now properly authorised.

I turn now to the first respondent's answering affidavit. In the affidavit the first respondent advances a number of reasons why the provisional order of sequestration should be discharged but his principal contention is that on the evidence now placed before it the Court cannot be satisfied that the respondents are in fact insolvent as alleged by the applicant. Dealing with the allegation that the first respondent is indebted to the applicant in the sum of N$272 367.19 in respect of overdraft facilities the first respondent has the following to say. First, he points to the fact that in an

action brought on 10th July, 1995 in respect of one of the two overdraft facilities in question the applicant's claim was for N$132 617.58. Then he refers to the fact that that action was, and still is, defended and

that an application for summary judgment was successfully resisted. I do not propose to examine the nature of the defence advanced but it is of relevance that Van der Wath states in his founding affidavit that the applicant is prepared, for the purposes of the sequestration application, to waive two contested sums debited to the first respondent's account, namely N$13 303.08 and N$9 523. The first respondent alleges that on a true analysis of the figures the amount owing in respect of overdraft facilities, even on the applicant's version, does not exceed N$143 270.23 and in his replying affidavit Van der Wath, without admitting the correctness of the first respondent's contention, states that the Court can use the figure advanced by the first respondent. Mr Potgieter submits that in fact the Court should ignore the alleged overdraft indebtedness altogether as it is lis pendens and defended by the first respondent on bona fide and reasonable grounds.

With regard to the sums of N$272 369.96, N$134 660.91 and N$115 927.92 allegedly owed in respect of various instalment sale transactions and a loan, the first respondent admits that a debt exists but questions the accuracy of the interest included in these sums. However, the first respondent points out that even if the applicant's calculations are correct the indebtedness arising from these transactions does not exceed N$522 958.79 of which only N$417 030.87 is, on the applicant's version, payable immediately.

With regard to the sum of N$2 298 548.40 the first

respondent says that this sum is not owing at all. He contends that when Van der Wath alleged in the founding affidavit that • the applicant offered the nine vehicles for sale on about 6th April, 1995 on instalment sale terms and that the first respondent accepted

the offer by appending his signature to nine instalment sale agreements the deponent was misleading the Court as to what in fact occurred. And in so doing he suppressed a letter which gives an entirely different picture of what occurred. The first respondent says that what in fact happened was that the vehicles in question were handed to him during the course of 1994 and two of the applicant's officials represented to him that the applicant would be interested in selling the vehicles to him. The first respondent says that he made prepayments to the applicant in respect of the proposed sale amounting in total to N$366 817.22 and he annexes copies of paid cheques to his affidavit amounting to this sum. However, although he signed the agreements the applicant declined to do so. Van der Wath's contention that the written agreements were valid and binding on the parties is, according to the first respondent, not only incorrect but flies in the face of the written stance which the applicant adopted at the material time.

The letter to which the first respondent refers is annexed to his affidavit. It is addressed to the first respondent and signed by two of the applicant's officials. It is headed "RE: SUBSTITUTION OF HIRE PURCHASE CONTRACT" and reads as follows:

> "We regret to advise that we have not approved any substitution of hire purchase contracts signed by yourself on 6 April 1995 into your name.
>
> We herewith demand that the following vehicles under their respective contracts to be returned to the premises of Truck Namibia (Proprietary) Limited at 14 Ruhr Street, Northern Industrial Area, Windhoek by not later than 11 am on Friday 21 April 1995."

There then follows a list identifying the vehicles and the letter concludes:

> "Should any of these trucks or trailers not be at the premises as instructed by 11 am Friday 21 April 1995, we will immediately lay a charge of theft against you.
>
> Please do not treat this matter with contempt."

It appears clear from this letter that the applicant, no doubt as it was entitled, was not prepared to contract with the first respondent on the terms set out in the instalment sale agreements which he had signed or at all and yet in his affidavit Van der Wath not only averred that the agreements had become valid and binding on the

parties but omitted to make any reference whatsoever to the letter. In his replying affidavit Van der Wath seeks to justify the non-disclosure of the letter on the basis that in its founding affidavit the applicant decided to utilise the first respondent's contention made in a letter from his attorneys dated 18th April, 1995 that the agreements were complete and not subject to the applicant's approval; but I find this answer disingenuous in the extreme. It is clear that for the purposes of the sequestration application the applicant saw advantage in changing its earlier stance that no agreement had been completed and claimed instead that it had a valid claim for an amount in excess of N$2 000 000 arising from the agreements. In advancing this claim it chose not to apprise the Court of a very material document.

It is, of course, a well-established principle that the utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court and where material facts have not been disclosed which might have influenced the decision of the Court whether to make the order or not the Court has a discretion to set aside the order on the ground of non-disclosure: De Jager v Heilbron and Others. 1947(2) SA 415 (W) at 419 and the cases there cited. I agree with Mr Potgieter that the fact that the applicant had originally maintained that the agreements had not been completed should have been explicitly dealt with in the founding affidavit and the non-disclosure of this material fact would, in itself, justify the discharge of the provisional order. Mr Potgieter, however, goes further. He submits that it is clear from the letter that the applicant was not prepared to enter into the instalment sale agreements. On a proper legal analysis no question arises of the applicant making an offer which was then accepted by the first respondent thus creating a valid contract. I find it unnecessary to reach any firm

conclusion on this question for the purposes of deciding the outcome of the application before me. All I need say is that on the evidence as it stands I am not satisfied that the applicant has established that the first respondent is indebted to it in the sum

of N$ 2 298 548 and if the applicant wishes to persist in its claim it must institute action against the first respondent to prove it.

Apart from the applicant's claims against the respondents there is also the allegation that the first respondent has other creditors with judgments or claims totalling N$l 280 843.11. The first respondent deals with this allegation in his answering affidavit and says that all judgments have now been paid. He annexes various documents which he contends evidences the payments made. In his replying affidavit Van der Wath criticises the quality of some of the documentary evidence but looking at the matter on a balance of probabilities it seems to me probable that the first respondent has, as he says, discharged these particular liabilities. The fact that he does not disclose how he was able to discharge them, a point made by Van der Wath, does not, in my view, affect the general question now before me.

As for the claims made by other creditors the first respondent says that all these are being defended on bona fide and reasonable grounds and attorneys have been instructed. Van der Wath seeks to pour scorn on this averment stating that the first respondent has failed to disclose his grounds of defence to each of the claims. He also makes the point that in the case of the largest claim, which is for N$548 243.65, it is unlikely that it would have no legal basis whatsoever. Quite apart from not being particularly impressed with this point I must remind myself that when considering whether a debtor is in fact insolvent mere failure to pay creditors is not evidence of a state of insolvency. Having regard to this and the first respondent's averment that the alleged debts are not properly due • I am not prepared to infer insolvency from these allegations made by the applicant.

The claims set out in the founding affidavit which can be taken into account when determining whether the applicant has shown that the respondents are insolvent amount, therefore, to no more than N$666 229.02 of which part is not immediately payable. I conclude in this sum the overdraft indebtedness which is lis pendens. Mr Potgieter

not only points to the fact that this sum is less than the respondent's assets, as set out in the founding affidavit, but it is, so counsel contends, much less than the total amount of the counterclaims which the first respondent has against the applicant. In his answering affidavit the first respondent alleges that he has three counterclaims against the applicant. The first, he says, arises out of payments made by him to the applicant in contemplation of entering into the nine instalment sale agreements referred to earlier in this judgment. The first respondent alleges that he paid the applicant a total amount of N$366 817.22 in this regard and he annexes to his affidavit copies of the cheques which he says were drawn. He says that as a result of the applicant declining to conclude the agreements the applicant is obliged to refund these payments. The applicant joins issue with the first respondent with regard to this claim and in his replying affidavit Van der Wath avers that if there were any substance in the first respondent's allegation that the sums paid were pre-payments one would

expect to find the amounts reflected on the agreements themselves. They are not. Van der Wath also refers to a letter dated • 18th April, 1995 from the first respondent's attorney in which it is stated that the first respondent has paid N$100 000 to the applicant in order to cover arrear payments on the previous hire purchase agreements and Van der Wath states that this is in complete contrast to the first respondent's present version. It may be that there is merit in the point made by Van der Wath but it is not clear to me on the face of the letter referred to, that the first respondent's attorneys were necessarily referring to tJ same payments now relied upon by the first respondent, for the absence of any reference in the agreements to alleged repayments that is indeed curious but to label i "ridiculous", as it would appear Van der Wath does i affidavit, goes much too far. Indeed, if, as Van de' alleges, the payments were made by the first respond the use of the vehicles it is surprising that no d have been produced by the applicant to supp* allegation. In my view, the allegations made b} respondent have a sufficient basis for the Cou? this counterclaim into consideration when decic the respondents are insolvent or not.

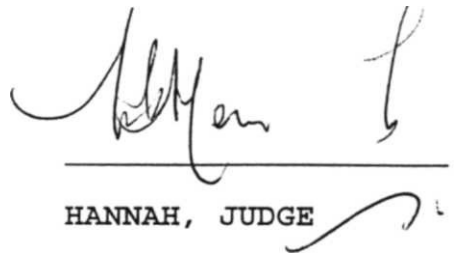
The second counterclaim which the first resp< has against the applicant arises from **re** allegedly effected to the vehicles which subject of the proposed nine instalment sal alleges that the cost of these repairs carr '^xes six invoices to his answer

respondents' assets it is clear on the figures before me that the applicant has failed to show that the respondents' liabilities exceed their assets and accordingly the provisional order for sequestration must be discharged. In his answering affidavit the first respondent advanced other grounds upon which he contended the provisional order should be discharged but in view of the finding I have just made it is unnecessary to deal with these.

The respondents are clearly entitled to costs and given the complexity of the matter I see no reason why such costs should not include the costs of two counsel.

When launching the application the_ applicant was aware of the first respondent's counterclaims. Also, as I see it, the applicant orchestrated affairs so that criminal proceedings would be launched almost simultaneously with the application for sequestration and it should have been aware of the fact that once the Court was apprised of the fact that the first respondent would oppose this application, a fact which the applicant must have realised, account would probably not be taken of the amounts arising from the alleged fraud. Further, the applicant must, or at very least should, have realised that its case, as based on the nine instalment sale agreements, was open to attack and yet suppressed a material document disclosing the line of such attack. In all the circumstances I am of the view that costs should be on the scale of attorney and client.

For the foregoing reasons the rule nisi and provisional order of sequestration are discharged with costs on the such scale of attorney and client costs to include the costs of two counsel.



HANNAH, JUDGE

ON BEHALF OF THE APPLICANTS: Instructed by:

ON BEHALF OF THE RESPONDENTS: Instructed by: