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Your Ref: Mr A Beamish
Our Ref: J Cameron/corres/Moneyweb/Bobroff- sequestration
Date: 9 March 2018

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JOHANNESBURG

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Dear Sirs

OUR CLIENTS: RONALD BOBROFF AND DARREN RODNEY BOBROFF ("THE BOBROFFS") AND CINDI JACHES
RE: APPLICATION BY C M MAREE AND Y MOTARA FOR THE FINAL SEQUESTRATION OF THE BOBROFFS' ESTATES - HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION - CASE NO 2016/32219 ("THE APPLICATION")

We address this communication to you on the instructions of our clients, our clients having received from you "a draft of a piece" prepared for publication by your Mr Tony Beamish, a copy whereof is attached hereto.

As you are in no doubt aware, there exists in South African Law the *sub judice* rule, which rule prohibits litigants and their attorneys from issuing statements and the like whilst the relevant legal proceedings are being adjudicated by the Presiding Judge concerned (as you are in no doubt aware, Judge Molahlehi is currently considering the Application and the arguments of counsel and intends to hand down his judgment on the 23rd March 2018). By virtue of the aforegoing our clients will not be commenting on any of the contents of the "piece" save that the writer will do so in order to record what took place at Court on the 1st March 2018.

As regards what took place at Court on the 1st March 2018 (your Mr Beamish was not present thereat), the persons present thereat were the respective legal teams of the parties and in the public gallery there were seated a Mr Bezuidenhout, a Mr Katz and a Mr Krawitz- the last two mentioned persons are persons in the employ of Discovery Health) (no doubt

your Mr Beamish obtained from one or more of the aforementioned persons, to the exclusion of the Bobroffs' legal team, false information and no doubt for the purposes of creating the impression that there exists some form of dissention between the members of the Bobroffs' legal team):-

1. shortly before the hearing commenced, the Bobroffs counsel, Mr A Subel S.C., handed to counsel for the applicants, Mr J Erasmus ("Erasmus") a copy of an affidavit deposed to by Mr Ronald Bobroff (this affidavit related to an application by the Bobroffs to strike out certain irrelevant documents which the attorneys for the applicants had simply irregularly and improperly filed in the court file without any explanation and more particularly without conforming with the relevant rules of the Uniform Rules of Court) - in case you do not have in your possession this affidavit, we are attaching it hereto; and

2. when Judge Molahlehi commenced the hearing of the Application, Adv Subel S.C., the Bobroffs' senior counsel, advised him of the existence of the replying affidavit, advising him of the fact that it had only recently been received (Ronald Bobroff having signed it in Australia earlier that day and he having transmitted it by email to our offices a short while prior to the commencement of the hearing); and

3. in response to that matter indicated in numbered paragraph 2, Erasmus advised Judge Molahlehi that he required a short adjournment in order that he could consider the contents of the affidavit and to take instructions from the legal representatives of the applicants – this adjournment was granted; and

4. the Bobroffs' application for the striking out of the material was argued during the course of the Application (Erasmus' attempt to have the striking application dealt with at the commencement of the hearing was rejected by Judge Molahlehi).

We, "like attorney Millar", are confident that "justice will prevail".

Yours faithfully

J J F Cameron

P.S. we are attaching hereto the Heads of Argument of counsel for the Bobroffs and we invite you to attach them to your "piece" as the contents thereof clearly demonstrate that the Bobroffs have the relevant bona fide grounds upon which they are entitled to oppose the Application.

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High - Affidavit - Replying - Bobroff -sequestration- 2016/32219 – 28 Feb 2018 2nd draft

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2016/32219

In the matter between:

MAREE, CHRISTINE MARIE	First Applicant
MOTARA, YASMIN	Second Applicant
and	
BOBROFF, RONALD	First Respondent
BOBROFF, DARREN RODNEY	Second Respondent

RESPONDENTS' REPLYING AFFIDAVIT

I, the undersigned

RONALD BOBROFF

do hereby make oath and state: -

1. I am an adult male and am the First Respondent in these proceedings. I am duly authorised to depose to this affidavit on behalf of the Second Respondent in these proceedings. The facts herein contained are, save where otherwise indicated, within my own personal knowledge and are true and correct.

2. I have read the answering affidavit of **ANTHONY PETER MILLAR** ("Millar") dated the 26th February 2018, which affidavit constitutes Millar's response to my

attorney's founding affidavit in an application by the Second Respondent and me to strike out the contents of Annexures JJF 1 and JJF 2 which the Applicants have filed in the main application without any explanation and/or motivation why they have not done so.

3. I record that in responding to the contents of Millar's affidavit that I do so without admitting and/or conceding that I am obliged to do so, the documents and affidavits (Annexures JJF 1 and JJF 2) having been served and filed in a manner which does not comply with the Uniform Rule of Court i.e. as such can never be considered.

THE CONTENTS OF MILLAR'S ANSWERING AFFIDAVIT

4. **AD PARAGRAPH 1**

For the reasons indicated hereinbelow, I deny that all the facts deposed to by Millar are within his personal knowledge and/or are true and correct and furthermore I dispute and deny that Millar is authorised to depose to the answering affidavit on behalf of the Applicants.

5. **AD PARAGRAPH 3**

5.1. The Second Respondent and I do not deny that we are the owners of the majority of funds (credit balances in 2 bank accounts in Israel) – a minor amount in the region of R1 million is held for the benefit of a family member.

J.P.

5.2. The existence and the extent of the funds were never disclosed by the Second Respondent and me in any of the affidavits previously deposed to by us in these proceedings for the following reasons:-

5.2.1. we were advised by Cameron that we were under no obligation to do so for the reason that such information was by its nature private and certainly not for the consumption of the Applicants and more specifically their attorneys (their attorneys being "armed" with no less than 11 other unlawfully procured judgments arising from the conclusion of settlement agreements which to all intents and purposes were procured as a consequence of unlawful conduct on the part of attorney Millar – this conduct being detailed in an affidavit deposed to by the auditor of the Firm being Mr Andrew Fischer – his affidavit to be located at paginated pages 747 – 752, to which affidavit Millar has never responded); and

5.2.2. in the event that we had detailed same then we were in no doubt that Millar would have taken steps to have the unlawfully obtained judgments recognised by a Court in Israel under and in terms of its Foreign Judgments Enforcement Law – 1958, a copy of the Law I annex hereto as **Annexure RA1**; and

5.2.3. we were advised by Cameron that the Applicants had no claims against us whether under Section 19 (3) of the Companies Act

J.B.

and/or Section 24 (a) of the Attorneys' Act (extracts whereof I annex hereto as **Annexures RA2** and **RA 3)** - the Court, in the Motara and in the Maree application, had not yet handed down a judgment and furthermore the Second Respondent and I contend that the settlement agreements that were made orders of Court (in our absence and in non-compliance with the Uniform Rules of Court) did not constitute debts and liabilities of the Firm and/or were not contracts between the Applicants and the Firm for the reason that such contracts were unlawfully contracted.

5.3. As regards documents relevant to the Firm and its affairs:-

5.3.1. I am unable to respond thereto as I have no idea as to what these are; and

5.3.2. any imputation that the Second Respondent and I were parties to the concealment of such records is denied; and

5.3.3. it would appear that the curator is in the process of determining from these recently obtained records as to what further claims there may be against the Firm (I draw attention to the fact that even if these records should demonstrate that further clients of the Firm have not received the full extent of their claims from the Firm – as a consequence of the Firm deducting fees in excess of that prescribed in the Contingency Fees Act – then such claims would

J.P.

have become prescribed by reason the fact that after the De La Guerre judgment the Firm never relied upon agreements with its clients outside the scope and the parameters of the maximum amount of fees that the Firm was entitled to deduct from awards that the Firm received from the RAF i.e. a period of more than 3 years has taken place and these unidentified persons have not instituted legal proceedings against the Firm and it would appear that the curator is some how or other attempting to identify these persons, the extent of their claims against the Firm and then after that exercise advising such persons that their claims against the Firm have become prescribed.

6. **AD PARAGRAPH 4**

As regards Millar's denial contained in the second sentence of this paragraph I dispute same.

7. **AD PARAGRAPHS 6**

7.1. Suitable legal argument will be advanced by the Second Respondent's and my legal representative at the hearing of this application.

7.2. As I have indicated hereinabove, save for a small amount, we are the owners of credit balances in 2 accounts in Israel. The extent of this amount far

surpasses any indebtedness owed by the Second Respondent and me to the Applicants and the other persons who are referred to in the supplementary founding affidavit of Millar (see paginated pages 116 and 117) i.e. the aggregate of the claims is indicated to be slightly more than R17m.

7.3. If, for the purposes of the exercise, one adds the sum of R17m to the aggregate of the requisitions (which appear at paginated pages 1035 to 1052) and excluding duplications these total no more than R22m i.e. an aggregate of R39m then it is abundantly obvious that the estates of the Second Respondent and me solvent by a wide margin.

8. **AD PARAGRAPH 7**

8.1. I refer to what I have hereinbefore stated.

8.2. I reiterate that the aggregate of the amounts reflected in the requisitions lodged by certain persons claims against the estates of the Second Respondent and me (excluding the claims of the Applicants and the other 11 ex-clients of the Firm) are approximately R22 m.

8.3. I draw attention to the fact that apart from certain minor claims (a doctor and certain employees) and a claim of R1m of my spouse against the Second Respondent all other claims arise as a consequence of the provisions of Section 19 (3) of the Companies Act and/or Section 24 (a) of the Attorneys Act.

J.P.

8.4. I invite and challenge Millar to produce any other "debt" that has been "presented to the provisional trustee".

8.5. I contend that Millar dishonestly and disingenuously records that the provisions of the Companies Act and Attorneys Act referred to in paragraph 8.3 is of automatic application in that debts of incorporated practices should be taken into account by the directors of such incorporated practices when they, for example, draw up their balance sheets – the fallacy of this contention "lies" in the fact that if this is so then every director of incorporated practices including every large legal firm in South Africa would be insolvent.

9. **AD PARAGRAPHS 8 -11**

9.1. I repeat I repeat what I have hereinbefore stated.

9.2. The funds in the 2 bank accounts in Israel have been "frozen" .

9.3. Millar is aware of the fact that these funds have been frozen as the NDPP contends that they constitute amounts which the Firm unlawfully retained in the form of fees arising from the payment of awards by the RAF to the Firm and as a consequence of ex-clients of the Firm having instituted claims against the RAF – on Millar's own version, the Applicants and at least another 11 clients of NBP "fall" into this group of ex-clients of the Firm.

J. P.

9.4. The Second Respondent and I are opposing the forfeiture application of the NDPP and we are confident that in due course the funds will become "unfrozen".

10. **AD PARAGRAPH 12**

10.1. The Second Respondent and I dispute and deny that we have "hidden" assets.

10.2. I refer to what I have hereinbefore state.

10.3. I draw attention to the fact that if the Second Respondent and I sought to hide our major assets (the credits in the 2 Israeli bank accounts) it would have been a simple enough task to have "hidden" these amounts in companies and/or trusts to hold same on our behalf and to have appointed nominee persons to represent these entities i.e. we did not do so.

11. **AD PARAGRAPH 13**

11.1. Suitable legal argument will be advanced by the Second Respondent's and my legal representative at the hearing of this application.

11.2. The assertion that the Second Respondent and I have persistently refused to cooperate is such that it is impossible to respond thereto. For the record

J.P.

the Second Respondent and I have studiously cooperated with the joint trustees of our respective estates. As regards cooperation with the curator of the Firm, no cooperation has ever been sought by him from us i.e. the curator has only engaged with Bezuidenhout to the exclusion of the Second Respondent and me (Bezuidenhout and curator having in their possession and/or access to all of the books and records of the Firm **none of which the Second Respondent and I have removed and/or concealed – it was always our intention to return to South Africa within a few days of our hurried departure**) and no doubt he has not done so as the types of financial information he would require would be available from the electronic books and records .

RONALD BOBROFF

I certify that the deponent has affirmed that he knows and understands the contents of this affidavit which was signed and sworn to before me at Sydney, Australia on this the 1st day of March 2018 in compliance with the Laws of New South Wales, Australia.

Before me: JOHN CHARLES DAVIS (Name of witness)

Signature of witness: J.P.

APOSTILLE

(in terms of the Hague Convention dated 5th October 1961)

1. Country : Australia

This apostille has been signed by

2. JOHN CHARLES DAVIS.

3. acting in the capacity as: ~~Notary~~/Justice of the Peace/~~Commissioner of Oaths~~

4. which bears the ~~seal~~/ stamp of the ~~Notary~~/Justice of the Peace/ ~~Commissioner of Oaths~~

Certificate

5. at Sydney, Australia

6. on the 1st March 2018

7. by: JOHN CHARLES DAVIS.

8. Registration Number (if any): 115826.

9. that person whose signature appears hereinabove was appended by him in my presence I satisfying myself as to his identity.

10. Signature: _____

STAMP OF THE NOTARY/JUSTICE OF THE PEACE/COMMISSIONER OF OATHS

JUSTICE OF THE PEACE
JOHN CHARLES DAVIS
Registration 115826
160 Marsden St
Parramatta NSW 2150
Appointed for the State of New South Wales Australia

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Foreign Judgments Enforcement Law - 1958 RA1

1. Definition:

In this law:
"Foreign Judgment" means a judgment given by a court in a foreign state in a civil matter, and includes a judgment for the payment of compensation or damages to an injured party even though it may not have been given in a civil matter.

2. No enforcement save under this law:

A foreign judgment shall not be enforced in Israel save under this Law.

3. Conditions of enforcement:

A court in Israel may declare a foreign judgment enforceable if it finds that –
(1) the judgment was given in a state the courts of which were, according to its laws, competent to give it; and
(2) the judgment is no longer appealable; and
(3) the tenor of the judgment is not repugnant to the laws of the State of Israel or to public policy in Israel; and
(4) the judgment is executory in the State in which it was given.

4. Reciprocity of enforcement:

(a) A foreign judgment shall not be declared enforceable if it was given in a state the laws of which do not provide the enforcement of judgments of Israel courts.
(b) The court may, on the application of the Attorney General, enforce a foreign judgment even where reciprocity, within the meaning of subsection (a), is not accorded.

5. Period of enforcement:

The court shall not entertain an application for the enforcement of a foreign judgment if such application is filed more than five years after the day on which the judgment was given, unless a different period has been agreed upon between Israel and the state in which the judgment was given unless the court considers that there are special reasons justifying the delay.

6. Projection against enforcement:

A foreign judgment shall not be declared enforceable if it is proved to the court:

(1) that the judgment was obtained by fraud; or

(2) that the defendant was not afforded a reasonable opportunity to present his arguments and to produce his evidence before the judgment was given; or

(3) that the judgment was given by a court not competent to give it; or

(4) that the judgment is at variance with another judgment given in the same matter between the same parties and still valid; or

(5) that at the time the action was brought in the foreign court a suit in the same matter and between the same parties was pending before a court or tribunal in Israel.

7. Restriction on enforcement:

A foreign judgment shall not be declared enforceable if its enforcement is likely to prejudice the sovereignty or security of Israel.

8. Enforcement of provisional judgment

The court may, if it considers that the circumstances of the case justify its doing so, enforce a foreign provisional judgment or interim order in a

and interim order:	matter of maintenance even though such judgment or order may still be appealable, so long as the other conditions imposed by this Law are fulfilled in respect thereof.
9. power of enforcement:	The District Court of Jerusalem shall have exclusive power to declare a foreign judgment enforceable.
10. Execution of enforceable foreign judgments:	A foreign judgment which has been declared enforceable shall for the purposes of execution, have the effect of a judgment validly given in Israel.
11. Recognition of Foreign judgments:	In hearing a matter within its jurisdiction, a court or tribunal in Israel may recognize a foreign judgment for the purposes of that matter if it deems it proper so to do in the interests of law and justice.
12. Repeal:	There are hereby repealed: (1) the Judgments (Reciprocal Enforcement) Ordinance); (2) the Judgments (Reciprocal Enforcement – Egypt) Ordinance; (3) the Probates (British and Colonial) Ordinance); (4) the Foreign Judgment Rules, 1928).
13. Implementation and regulations:	The Minister of Justice is charged with the implementation of this Law and may make regulations as to any matter relating to such implementation, and in regulations under this section he may prescribe special rules for dealing with applications for enforcement, in so far as such is necessary in order to give effect to an agreement between Israel and a foreign state.

David Ben Gurion
Prime Minister

Yitzchak Ben-Zvi
President of the State

Pinchas Rosen
Minister of Finance

(2) The latest version of a company's Memorandum of Incorporation that has been endorsed by the Commission in terms of this Part prevails in the case of any conflict between it and any other purported version of the company's Memorandum of Incorporation.

Notes

[Formerly 57]

General Note.—The Memorandum of Incorporation, as altered or amended, will prevail in case of a conflict between it and the consolidated Memorandum of Incorporation, unless the consolidated version has been ratified by way of a special resolution at a general shareholders' meeting of the company.

19. Legal status of companies.—(1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company—

(a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;

(b) has all of the legal powers and capacity of an individual, except to the extent that—

(i) a juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) the company's Memorandum of Incorporation provides otherwise;

(c) is constituted in accordance with—

(i) the unalterable provisions of this Act;

(ii) the alterable provisions of this Act, subject to any negation, restriction, limitation, qualification, extension or other alteration that is contemplated in an alterable provision, and has been noted in the company's Memorandum of Incorporation; and

(iii) any further provisions of the company's Memorandum of Incorporation.

(2) A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

(3) If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

(4) Subject to subsection (5), a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document—

(a) has been filed; or

(b) is accessible for inspection at an office of the company.

(5) A person must be regarded as having notice and knowledge of—

(a) any provision of a company's Memorandum of Incorporation contemplated in section 15 (2) (b) or (c) if the company's name includes the element "RF" as contemplated in section 11 (3) (b), and the company's Notice of Incorporation or a subsequent Notice of Amendment has drawn attention to the relevant provision, as contemplated in section 13 (3); and

(b) the effect of subsection (3) on a personal liability company.

[Sub-s. (5) substituted by s. 12 of Act No. 3 of 2011.]

(6) If a company has amended its Memorandum of Incorporation, the Memorandum of Incorporation as previously adopted by the company has no force or effect with respect to any right, cause of action or matter occurring or arising after the date on which the amendment took effect.

NA 3

if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney; or

[Para. (*d*) substituted by s. 9 (*c*) of Act No. 108 of 1984.]

Wording of Sections

(*e*)

if his estate has been finally sequestrated and he is unable to satisfy the court that despite his sequestration he is still a fit and proper person to continue to practise as an attorney.

[Para. (*e*) added by s. 53 of Act No. 129 of 1993.]

(2) (*a*) If it appears to the court that a person in respect of whom a society intends making an application under subsection (1), has left the Republic and that he probably does not intend to return to the Republic and that his whereabouts are unknown, the court may order that service on that person of any process in connection with such application may be affected by the publication of such process in an Afrikaans and an English newspaper circulating in the district in which the said person's last known business address, as entered in the records of the society concerned, is situated.

(*b*) Any such process may, if the court so orders, be so published in a form as near as may be in accordance with Form 1 (Edictal Citation) of the First Schedule to the Supreme Court Rules.

[Para. (*b*) added by s. 12 of Act No. 87 of 1989.]

(*c*) Any process referred to in paragraph (*b*), shall before the publication thereof be approved and signed by the registrar concerned.

[Sub-s. (2) added by s. 4 of Act No. 76 of 1980. Para. (*c*) added by s. 12 of Act No. 87 of 1989.]

Repealed Act

Act 44 of 1949 has been repealed by s 26 of Act 88 of 1995

Wording of Sections

s 22(1)(a)(ii) of Act 53 of 1979 prior to amendment by Act 108 of 1984

Wording of Sections

s 22(1)(d) of Act 53 of 1979 prior to amendment by Act 108 of 1984

23. Juristic person may conduct a practice.—(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if—

J.P.

(*a*)

such company is incorporated and registered as a private company under the Companies Act, 1973 (Act No. 61 of 1973), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office;

(*b*)

only natural persons who are practitioners and who are in possession of current fidelity fund certificates are members or shareholders of the company or persons having any interest in the shares of the company;

(*c*)

the name of the company consists solely of the name or names of any of the present or past members of the company or of persons who conducted, either of their own account or in partnership, any practice which may reasonably be regarded as a predecessor of the practice of the company: Provided that the words "and associates" or "and company" may be included in the name of the company.

(2) Every shareholder of the company shall be a director of the company, and only a shareholder of the company shall be a director thereof.

(3) If a shareholder of the company or a person having any interest in the shares of the company, dies or ceases to conform to any requirement of subsection (1), (*b*), he or his estate, as the case may be, may, as from the date on which he dies or ceases so to conform, continue to hold the relevant shares or interest in the shares in the company for a period of six months or for such longer period as the council of the society of the province in which the company's registered office is situate, may approve.

(4) No voting rights shall attach to any share held in terms of subsection (3), and the holder of any such share shall not act as a director of the company or receive, directly or indirectly, any director's fees or remuneration or participate in the income of or profits earned by the company in its practice.

(5) If the articles of association of the company so provide, the company may, without confirmation by a court, upon such conditions as it may deem expedient, purchase any shares held in it, and the authorized share capital of the company shall not be reduced thereby.

(6) Shares purchased in terms of subsection (5) shall be available for allotment in terms of the articles of association of the company.

J.P.

(7) Notwithstanding anything to the contrary contained in any other law, the articles of association of the company may provide that a member of the company may not appoint a person who is not a member of the company, to attend, speak or vote in his stead at any meeting of the company.

(8) If the company ceases to conform to any requirement of subsection (1), it shall forthwith cease to practise, and shall, as from the date on which it ceases so to conform, not be recognized in law as a practitioner: Provided that the provisions of this subsection shall not, during the period referred to or contemplated in subsection (3), apply to a company by reason only that a shareholder of the company or a person having any interest in the shares of the company has ceased to be a practitioner or to be in possession of a fidelity fund certificate.

(9) Any reference in this Act or in any other law to a practitioner or to a partner or partnership in relation to practitioners, shall be deemed to include a reference to a company under this section or to a member of such a company, as the case may be, unless the context otherwise indicates.

24. Applications in terms of this Chapter to be delivered to secretary of society concerned.—Subject to provisions to the contrary in this Chapter contained, any person who makes an application to a court in terms of this Chapter, shall, at least one month before the date of his application, deliver to the secretary of the society of the province in which the court to which such application is made is situated, a copy of the application, together with copies of the other documents and papers referred to therein or connected therewith.

CHAPTER II
FIDELITY FUND

[Heading substituted by s. 13 of Act No. 87 of 1989.]

25. Continued existence of Fidelity Fund.—The fund established by section 8 of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941 (Act No. 19 of 1941), shall notwithstanding the provisions of section 86, continue to exist under the name the Attorneys Fidelity Fund.

[S. 25 substituted by s. 14 of Act No. 87 of 1989.]

Wording of Sections

Wording of Sections

s 25 of Act 53 of 1979 prior to amendment by Act 87 of 1989

26. Purpose of fund.—Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of—

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/32219

In the matter between:

MAREE, CHRISTINE MARIE	First Applicant
MOTARA, YASMIN	Second Applicant
and	
BOBROFF, RONALD	First Respondent
BOBROFF, DARREN RODNEY	Second Respondent

RESPONDENTS' HEADS OF ARGUMENT : RETURN DAY

Introduction

1 On 13 March 2017 (in a written judgment dated 7 March 2017), the court granted an order provisionally sequestrating the estates of the first and second respondents (per E Theron AJ).[1]

2 The provisional order was returnable on 8 May 2017, on which date the respondents and any other person who wished to avoid such an order being made final, were called upon to advance reasons, if any, why the court should not grant final orders of sequestration.[2]

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1 See Judgment annexure AP2 p 969-989

2 See p 986 para 2; p 987 para 5

3 On 28 April 2017, the respondents served a "notice of intention to oppose the grant of final sequestration orders"[3] and seek an order, *inter alia*, that the provisional orders of sequestration granted on 13 March 2017 be set aside.

4 Already on 30 January 2017, the respondents had given notice of a conditional counter- application, relying upon certain paragraphs in their answering affidavit to stay the relief sought pending the outcome of certain rescission applications.[4] The form of that application, was criticised by the applicants,[5] and was reformulated as a substantive conditional counter -application, seeking a discharge of the provisional sequestration orders and a stay of the grant of the final sequestration order pending the outcome of certain rescission applications.[6]

5 The return date was extended, by agreement, ultimately to a special set down of the matter for hearing on 1 and 2 March 2018.

6 In anticipation of that date, a significant amount of paper has been exchanged. Included in the evidence to be considered on the return day, is evidence that was adduced prior to the hearing before Theron AJ, but which was not considered.[7]

7 The papers to be considered on the return day thus consist of the following:

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[3] See p 753

[4] See p 652.

[5] See p 946 paras 17-19

[6] See counter application p 1.

[7] See p 969, at p 970, para 8. Self-evidently, the affidavits were not referred to in the judgment.

7.1 The applicants' founding affidavit[8] wherein the applicants alleged three grounds of insolvency, namely,

7.1.1 In terms of section 8(a) of the Insolvency Act, 1936 ("the Act");

7.1.2 In terms of section 8(b) of the Act; and

7.1.3 actual insolvency.

(It is to be noted that the court granting the provisional orders of sequestration held that the grounds of actual insolvency and reliance on section 8(b) were not established by the applicants).

7.2 A supplementary founding affidavit[9] delivered wherein the applicants attempted to set out certain information relating to the assets of the first and second respondents,[10] and identified certain additional potential creditors against the estates of the respondents.

7.3 An answering affidavit filed on 30 January 2017,[11] comprising pages 238 – 334, together with annexures thereto comprising pages 335 – 641.

7.4 A notice of motion in respect of a counter- application relying upon identified paragraphs in the answering affidavit.[12]

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8 See pp 6-109

99 From p 112-204

10 See p 117 para 15 – p 122

11 See p 236

12 See pp 652-655

7.5 A replying affidavit in answer to the affidavit in the sequestration proceedings (the affidavit also contains matter being an answer to the application for condonation and the counter- application, which have been overtaken by events), comprising pages 663-706.

7.6 Supplementary answering affidavits by the first and second respondents comprising pages 710-734.

7.7 Affidavits of employees comprising pages 735 – 744.

7.8 An affidavit of Andrew Fisher comprising pages 745 – 752.

(All of the above matter was served prior to the hearing of the application, but the items referred to in 7.6 to 7.8 above were not taken into account by the court granting the provisional order.)

7.9 A supplementary answering affidavit / additional affidavit and replying affidavit to the replying affidavit of the applicants commencing at pages 757 – 800, wherein the respondents set out the reasons why the order should not be made final on the return date and detailing additional information relevant to the consideration of the matter on the return date together with annexures commencing at page 801-937.

7.10 An answering affidavit in response to the respondents' answering affidavit in the application dated 28 April 2017 commencing at page 941 – 1055.

7.11 A supplementary replying affidavit commencing at p 1058 – 1080, together with annexures from page 1081 – 1230.

7.12 The first and second applicants' further affidavit commencing at page 1233 – 1324.

7.13 A substantive notice of motion and counter- application, separately indexed and paginated.

8 There are further non-paginated and unattested documents that have been filed in the court file that form the subject- matter of an application to strike out.

9 Although these papers are prolix, the issues are narrow, and can be determined with reference to what is stated in these heads of argument.

10 A fair amount of the content of the affidavits is repetitive, a circumstance necessitated by the approach of the applicants in criticising the respondents' attempt to avoid prolixity and incorporate matter by reference.

11 As will be set out in these heads of argument, however, there are four narrow issues upon which this application can be determined:-

11.1 Is the application competent?

11.2 Have the applicants established their locus standi for the purposes of the sequestration application?

11.3 Did the applicants establish the jurisdictional fact necessary for the purposes of the application, and in particular, an act of insolvency as required by section 8(a) of the Act?

11.4 Should the court, if it is satisfied that the answer to the above three questions are in favour of the applicants, nevertheless exercise its discretion to decline the granting of a final order of sequestration.

The test on the return day

12 The court's powers on a return day of a provisional order are well established, and explicated in the following extract from Mars, Insolvency Law.[13]

> *"On the return day of the provisional order the court has a discretion finally to sequestrate the respondent's estate provided it is satisfied as to the three essential elements of the applicant's case ie that the applicant 'has established against [the respondent] a claim' upon the basis of which one is able to competently seek sequestration, that the respondent has committed an act of insolvency or is actually insolvent and that there is reason to believe that 'it will be to the advantage of creditors of the debtor if his estate is sequestrated.'*
>
> *...*
>
> *Where it is not satisfied as to the three elements of the applicant's case, not only is the court unable to make a final sequestration order, it must dismiss the application and discharge the provisional order, unless the court (as it may in terms of section 12(2) of the Insolvency Act) requires further proof of any matter 'set forth in [the application', in which event the court must postpone the hearing 'for any reasonable period but not sine die'. Where it exercises discretion to allow 'further proof of insolvency' such proof may be furnished by way of introduction of new matter in a replying affidavit, subject to the debtor's being granted the right to deal with such new matters. It may also be introduced by way of oral evidence.*
>
> *The exercise of the power, in terms of section 12(2) to require further proof depends in each case on its own facts; but such power should not be exercised where the result of the court's decision on the papers is that they disclose no cause of action for sequestration...*
>
> *Where it is satisfied that the three essential elements of the applicant's case have been established, the court has a discretion nevertheless as to whether a final order should be made. It may not exercise such discretion in favour of the respondents unless special circumstances are present justifying its withholding the final order,*

13

the onus of establishing such circumstances upon a balance of probabilities being upon the respondent. The discharge of this onus entails proof of facts showing that a postponement of the proceedings or the discharge of the provisional order will be more or at least, as, advantageous to the applicant and the other creditors (if any) in relation to obtaining payment than the administration of the estate in insolvency.

...

A creditor must retain his locus standi to sequestrate as at the return day of the provisional order, ie, in respect of the claim upon the basis of which such order was obtained. If as at the return day he has lost locus (example his claim has been discharged by a third party) the respondent himself could not lawfully effect such discharge, having been divested of his estate upon the grant of the provisional order, it is respectfully submitted that the court must discharge the provisional order and the further extension thereof for any purpose is incompetent. It is further submitted that the same situation obtains where the applicant never had locus standi, with the result that the provisional order should never have been granted.

...

The court must set aside (as distinct from merely formally discharging) a provisional order (where for any reason the operation thereof is to terminate) so as to eliminate its consequences, for example the vesting of the respondent's property in the Master in terms of section 20(1)(a) of the Insolvency Act.

...

An application is malicious (in the context of sequestration proceedings) when it is initiated with malice against the debtor, even if the applicant is able to make a case for sequestration; and that an application is vexatious, in this context, when it is initiated where the applicant has no basis at all upon which to make such a case."

Is the application competent?

13 The primary issue under this heading, is the "weighty authority"[14] for the proposition that the joinder of two separate estates in a single application for sequestration constitutes a fatal misjoinder.

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[14] See p 971, para [7].

14 Where, as in this application, the applicants seek to sequestrate the estate of joint and several debtors simultaneously, separate applications should be brought.[15]

15 An exception to this rule of practice is permitted where there is a complete identity of interests. The applicants have not attempted to establish an identity of interests; they have not even alleged the conclusion.

16 This issue was squarely contemplated by Theron AJ in paragraphs 7 to 17 of his judgment.[16]

17 Theron AJ departed from the well established practice in our courts holding that the judgment in *Ferela (Pty) Ltd v Craigie and others* 1980 (3) SA 167 (W) was clearly wrong.[17]

18 Subsequent to Theron AJ's decision his approach has been considered and found to be clearly wrong by Rome AJ in *Strutfast (Pty) Ltd v Sara Magadelena Uys and Another* Case No: 5675/2016 delivered on 5 July 2017, a copy of which is enclosed herewith.

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[15] See Mars, ibid, para 5.15, p 119. See also *Forella (Pty) Ltd v Craigie* 1980 (3) SA 67 (W); *Breetveldt v Van Zyl* 1972 (1) SA 304 (T); *Main Industries (Pty) Ltd v Serfontein & Ano* 1991 (2) SA 604 (N); *Caltex Oil (SA) (Pty) Ltd v Govenders Fuel Distributors (Pty) Ltd* 1996 (2) SA 552 (N); *Business Partners Ltd v Vecto Trade 87 (Pty) Ltd and others* 2004 (5) SA 296 (SE)

[16] See pp 970-973

[17] See pp 972 para 11

19 The reasoning of Rome AJ is commendable and properly identifies the reasoning of Theron AJ as a rejection of the principle of *stare decisis;* and accordingly clearly wrong.

20 This finding is dispositive of this application and demonstrates why it ought to have been dismissed at its inception; and why the application should be met with an attorney and client costs order.

21 The fact that there is not an identity of interests between the parties is aptly illustrated in the papers.

21.1 Each of the estates has different creditors. The second respondent has an indebtedness secured by a mortgage bond in favour of Standard Bank;[18] whereas the first respondent does not.

21.2 There are material differences in the estates of the persons concerned.[19] Each clearly ownes different immovable properties with differing answers to the question of a benefit to creditors.

21.3 One estate may be capable of being wound up speedily, the other may not; or they may both be truncated – in any of these events, a *concursus* in one estate should not be saddled with the time taken by the other estate to be wound up.

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[18] See p 729.

[19] See eg, pp117 – 122.

21.4 In neither case was the position of the respective spouses addressed, or the circumstances of their marriages; in contravention of the mandatory stipulation contained in section 9(3)(a)(ii) of the Act.

22 Furthermore, the application was defective because only a single security bond making provision for one estate (for a joint estate) has been issued for the two separate estates.[20] This does not comply with section 9(3)(b) of the Act.

23 The application is accordingly defective.

24 In the notice to reconsider the provisional order, the respondents (sic: should be applicants) request that they be ordered together with the person that furnished the Maser with the bond of security to pay the costs of administration as determined by the Master.[21]

Locus standi

25 The applicants must establish, on a balance of probabilities, that they have a claim against the respondents for purposes of the sequestration.

26 The so-called *Badenhorst Rule*[22] establishes that when faced with a prima facie case on a balance of probabilities in an opposed sequestration application, a respondent need only show that the indebtedness is disputed

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[20] See p 10, Annexure T.

[21] See p 754 para 4

[22] See *Kalil v Decotex* supra at 980 B-H

on *bona fide* and reasonable grounds to defeat the applicant's pursuit of the winding up. Thus, if a court is left in any doubt as to the validity of the sequestrating creditor's claim, it will refuse to order sequestration.[23]

27 The respondents are not required to demonstrate that they are not indebted to the applicants, but only that there is a triable dispute in relation to the claims of the applicants.

28 The applicants contend that the respondents are liable on the basis of facts and arguments that run as follows:

28.1 On 4 April 2016 Ronald Bobroff and Partners Inc ("RBP") entered into a settlement agreement with the first applicant, which was made an Order of Court.[24]

28.2 On 4 April 2016 Ronald Bobroff and Partners Inc ("RBP") and its directors entered into a settlement agreement with the second applicant, which was made an Order of Court.[25]

28.3 In compliance with the Court Orders the respective bills of costs were taxed and refunds were determined for alleged overreaching and interest in the sum of R1 551 885,01 and R2 046 777,03 in respect of the first and second applicants respectively.[26]

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[23] See *Fletcher & Co v White* 16 SC 276; *Hanson & Shreuder v Quirk* 5 EC 355; *Mayo v Paday* 1914 EDL 365; *Findlay & Co v Beetar* 1921 NLR 19; *Abattoirs Meat Market v Ismail* 1922 CPD 177; *Minooden v Attard* 1933 TPD 281

[24] See p 12 para 22;

[25] See p 13 para 25

[26] See p 12 para 23; p 13 para 26

28.4 Despite demand made by the first and second applicants on the respondents on 25 August 2016, the debts were not settled.[27]

28.5 In terms of section 23(1)(a) of the Attorney Act of 1979, directors of an incorporated firm are liable with the firm for debts and liabilities of the company that were contracted during their respective periods of office.[28]

29 This argument found resonance with Theron AJ,[29] although he held that *"I do not have to decide this issue"*.[30]

30 The respondents dispute their liability under the settlement agreements and the Court Orders.

31 In the first place, the respondents dispute that the settlement agreement and orders of court constitute "*debts and liabilities of the company that were contracted during their respective periods of office*."

31.1 The settlement agreements were entered into at a time when the respondents were not present in the country, and the affairs of the company were being run by the single director, Bezuidenhout and an attorney, Zimmerman, who concluded the settlement agreements.

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[27] See p 13 paras 24 and 27

[28] See p 12, para 20-21.

[29] See p 974 para 19-24

[30] See p 976 para 24, relying on *Hlobo v Multilateral Motor Vehicle Accident Fund* 2001 (2) SA 59 (SCA) and *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd and Ano* 2015 (4) SA 623 (WCC) at paras 2 1- 41

31.1.1 The relationship is described in the affidavit of a third party, the auditor of RBP, Andrew Fischer.[31] This affidavit was signed on 20 February 2017 and was served on 27 February 2017. It was thus before Theron AJ but was not considered at all in his decision. It has also been included in the notice of intention to oppose the grant of final sequestration orders as annexure SA8, page 828.

31.1.2 Fischer's affidavit records a meeting on 31 March 2016 in which Millar, the attorney acting for the applicants and 10 other clients, had a meeting with Zimmerman and Bezuidenhout. During that meeting:

> *"7.2 Millar conveyed to me that he Millar in his capacity as current president of the LSNP, would, in exchange for Zimmerman's co-operation in persuading Bezuidenhout on behalf of RBP to conclude the settlement agreements that were envisaged to be concluded, actively do whatever was within his power to ensure that LSNP would permit Zimmerman's firm (Taitz & Skikne) to retain all the files (these being the files that RBP has sold and transferred on 13 March 2016)."*

31.1.3 The affidavit goes on to describe how after these assurances had been given, Zimmerman and Bezuidenhout prepared the settlement agreements that were ultimately made orders of court for these two applicants and for the balance of the clients that Millar acted on behalf of.

31.2 Under these circumstances, the agreements are such that they would entitle the firm to avoid the contracts; and also the respondents to raise

[31] His affidavit commences at p 747

a defence that would have been available to the firm in the event that liability under the agreements was pressed by a creditor.

32 Secondly, it is common cause that the Order of Court in the case of the first applicant does not include a judgment against the directors personally; in the case of the second applicant it does.[32] At least in case of the first applicant, there is no judgment against the respondents.

33 Thirdly, the respondents have sought rescission of the orders granted in their absence.

33.1 The grounds of defence set out in the rescission applications speaks to the fact that the agreements were:-

33.1.1 Unauthorised and un-mandated; and

33.1.2 Fail to comply with Rule 31 insofar as they constitute consents to judgment.

34 Such rescission applications were dismissed by Foulkes-Jones AJ in December 2016 under circumstances where the merits of the rescission applications were not adjudicated, such order being made in a composite order emanating from a dispute in relation to a referral to evidence on the question of whether or not Bezuidenhout had authority to represent RBP and the respondents. The dismissal of the rescission applications forms the subject-matter of a pending application for leave to appeal (notice of application for

[32] See p 77 para 6; p 64-65

leave to appeal having been served), but the reasons for the dismissal of the rescission applications has not yet been furnished by the court; and neither have the applications been argued.

35 As a consequence of the intervening provisional sequestration of the respondents' estates, they have not been able to prosecute those applications. This becomes further relevant to the counter- application that is sought in this matter and the discretion that vests in the court of which more shall be said below.

36 The fact that the liability is disputed on reasonable grounds, and that there is a triable dispute regarding this liability, a dispute which was well known to the applicants at the time that they launched the application, indicates that the application constitutes an abuse of process, and has been brought *in terrorem* contrary to the principles stated in the so-called *Badenhorst rule*.

37 Under such circumstances, an application for the final sequestration of the estates should be dismissed with costs on the attorney and client scale.

Act of insolvency: section 8(a) of the Insolvency Act

38 This provision states:

> *"8. A debtor commits an act of insolvency –*
>
> *(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with the intent by so doing to evade or delay the payment of his debts."*

39 Save for the fact that the respondents left South Africa (described frequently as having "fled to Australia"), no facts that could establish an intention to evade or delay payment of debts are provided in the founding affidavit.[33]

40 In a supplementary founding affidavit,[34] the matter is not taken any further.

41 The court ordering the provisional sequestration however, referred to evidence contained in the respondents answering affidavit and considered the "cumulative effect of a number of diverse factors"[35] when it concluded that the act of insolvency was established. These facts included threats that had been made against the Bobroffs; and what apparently weighed heavily with the court was the fact

> *"[39]That on 11 March 2016 the firm, represented by the respondents, sold most of its clients [using the respondents' words] to attorney Rael Zimmerman for R30 million.*
>
> *[40] The respondents were thus attempting to liquidate one of their largest assets days before hurriedly leaving the country. Their fear for their, and their families' safety, however, did not extend to the first respondent's wife who was left behind."*

42 On the return day of the provisional orders of sequestration, the applicants are required to establish on a balance of probabilities that the debtor has left the Republic, alternatively remains outside the Republic, with the intention to evade payment of his debts to his creditors.

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[33] See p 18 para 44

[34] See pp 110-123.

[35] See p 978 para 36 - p 983 para 47

43 This may be established with reference to the cumulative effect of a number of diverse factors in order to establish what the "dominant, operative or effectual intention in substance and in truth of the debtor is."[36]

44 As indicated above, the applicants have adduced no evidence to establish this fact. There were no judgments against the respondents at the time that they left the country; each of the claims was being defended. In both instances each of the applications had been argued and the parties were awaiting judgment. The respondents believed they would be successful. But for the consent orders this may have been the case. As soon as they became aware of the judgments, they have taken steps to have them rescinded.

45 By contrast, the respondents have demonstrated that they have made arrangements for the continued payment of their debts and liabilities in supplementary answering affidavits.[37] These affidavits were before the court considering the provisional order, but were entirely disregarded.

46 As to the court's reliance upon the fact of the sale of the RBP business (a transaction that was set aside by the court thereafter), this is respectfully submitted incorrect:

46.1 Firstly, RBP – and not the respondents – sold the business. It was not a disposal of the respondents' shares, and the value ofthe business accrued to RBP.

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[36] See *Hassan and Another v Berrange NO* 2012 (6) SA 329 (SCA) at para 37; *Cooper & Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para 10

[37] See pp 710 - 734

46.2 Secondly, the sale of the business to Zimmerman was for the very purpose of discharging the liabilities of RBP to the Receiver of Revenue (for which the respondents would also be liable). This is on account of the fact that the sales proceeds which were applied first in discharge of the liability to the Receiver of Revenue.[38] The sale of business agreement also addressed the liability that may arise to employees of the firm.

46.3 Far from seeking to evade the debts, this action demonstrates an intention to discharge obligations.

47 At the time that the Bobroffs left South Africa, all of the applications (and the present two applicants' applications in particular) were being defended by RBP Inc, and instructions had been left for the purposes of conducting those defences. One cannot infer from the fact that they left the country that they intended thereby to evade payment of disputed debts.

48 It is important to note that the applicants do not engage the facts that demonstrate the conduct of Bezuidenhout and Zimmerman in capitulating and effectively surrendering these defences to the applicants in the matter.[39] This included matters where the claims had prescribed and where prescription has been upheld by the Supreme Court of Appeal[40] and the Constitutional Court.[41]

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[38] See p 837, para 4.2 and in particular para 4.2.2

[39] See p 664, para 5; p 943, para 9; Counter application p 122, para 5.

[40] See **Fluxmans Inc v Levenson** 2017 (2) SA 520 (SCA).

[41] See **Levenson v Fluxmans Inc** CCT 19/17handed down 30 October 2017.

49 It is respectfully submitted that the applicants have not discharged an onus, on a balance of probabilities, to show that the respondents have absented themselves from the Republic with an intention to evade payment of their debts.

50 Theron AJ correctly ruled in the application for provisional sequestration, that the applicants had not demonstrated an act of insolvency under section 8(b) of the Act; or the actual insolvency of the respondents.

51 Accordingly, the application falls to be dismissed; and given the complete absence of a case having been made out in the founding papers for the section 8(a) act of insolvency, costs should be awarded on the attorney and client scale.

Exercise of a discretion

52 Even where it has been established that the three essential elements of the applicants' case are present, the court has a discretion nevertheless as to whether final sequestration orders should be made. The onus of establishing the presence of special circumstances is on the respondents.

53 The supplementary answering affidavits of the respondents speak to this matter. These facts are not engaged with by the applicants,[42] and accordingly should be accepted as undisputed.

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[42] See p 671 paras 31 and 33

54 The respondents have set out how the liability to SARS has been discharged, and how RBP has valuable files, including the claim against Taitz and Skikne for the amounts due to the firm in consequence of Taitz and Skikne having executed the mandate of the firm to conclusion.[43]

55 These amounts will permit the discharge by the firm of the liability to the applicants (and indeed the additional claimants that are foreshadowed in the application papers). Given the fact that the debts may be discharged in this way, and that these facts have not been disputed,[44] the persistence in this application, without showing any benefit to creditors save an alleged forensic entitlement, without demonstrating cents in the rand to be paid as a dividend to the individual claimants, the applicants have not displaced the grounds for an exercise of the discretion in favour of the respondents.

56 In the circumstances, it is respectfully submitted that even if the court were to find that the three essential elements necessary to be proved by the applicants on the return day are proved, it should exercise its discretion against ordering final sequestration orders under the circumstances.

ARNOLD SUBEL SC

DIRK VETTEN

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Chambers, Sandton
22 February 2018

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[43] See pp 785-787

[44] See p 949 paras 34-37