DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
26/10/2012 DATE SIGNATURE

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

26/10/2012

CASE NO: 1422/12

In the matter between:

CASINO RETAIL (EDMS) BEPERK	**Intervening party**
HENNIE ELS FORENSIC INVESTIGATION AND AUDIT CONSULTANTS CC	**APPLICANT**
and	
DEONETTE DOMINIQUE FOURIE N.O. (In her capacity as the executrix testamentary of the estate of the late **DEON FOURIE** – Estate Number : 10991/2010)	**RESPONDENT**

JUDGEMENT

NV KHUMALO AJ

[1] This is an Application by Casino Retail (Edms) Beperk, ("Intervening party), a company duly registered and incorporated in terms of the Company Law Act 71 of 2008 (as amended), seeking to intervene and oppose an Application for the sequestration of the estate of the late Deon Fourie ("testator") brought by Hennie Els Forensic Investigation and Audit Consultants CC ("Applicant") against Deonette Dominique ("Respondent") in her representative capacity as Executrix testamentary.

BACKGROUND TO THE APPLICATION

[2] On 12 January 2012, the Applicant launched an Application for sequestration of the estate of the late Deon Fourie ("testator"), on the basis that,

(i) it is a creditor of the insolvent estate with a liquid claim of more than R100 00 (+-R82 000);

(ii) the executrix has committed an act of insolvency;

(iii) the estate is *de facto* insolvent; and

(iv) the sequestration of the estate will be to the benefit of the creditors.

The Respondent is not opposing the Application.

[3] Respondent is the 22 year old daughter of the testator, appointed Executrix in terms of Letters of Executorship issued on 12 July 2010. Her appointment was in accordance with the testator's will under which she together with her mother, ex wife of the deceased and younger sister are the only beneficiaries. The only most valuable asset in the estate is an immovable property known as Erf 1239 Alberton, zoned "special' for a

guest house and restaurant with conference facilities in terms of the Alberton Town Planning Scheme, consisting of a three storey building with a fully furnished restaurant, La Montanara, a Chapel for weddings, and movables in the amount of R250 000.

[4] The Respondent was being assisted in the winding up of the estate by T J Botha Spanneberg Inc of Alberton.

THE APPLICATION

[5] The Applicant alleges in the Sequestration Application that he was approached by the Respondent to assist with an investigation into the affairs of the estate and during the course of that investigation he consulted at length with the Respondent and her attorney and obtained the following relevant facts from various sources, documents and the consultations, that:-

[5.1] The Respondent was only 21 years old when she was appointed Executrix of her father's estate and has no formal education, her highest education achievement being a matric certificate therefore naïve when it comes to the affairs of administration of estates.

[5.2] The estate has as a result been stultified, to such an extent that it cannot be administered further due to lack of funds and opportunistic litigation and it therefore cannot pay its creditors.

[5.3] It is imperative that the estate be sequestrated so that a trustee can deal with the estate independently in the interest of creditors, for the following reasons:

[5.3.1] During the process of winding up the estate, Respondent employed Remax Alberton to market the property and through their agency she received three formal offers for the purchase of the property.

[5.3.2] The first offer dated February 2011 was by a purchaser known as Western Cape Fynbos Conservation Trust. The names of the trustees were not disclosed and were later identified as Neil Diamond and his wife Justine Diamond. The agreement stipulated that the property is being sold "voetstoots" and was subject to a suspensive condition that finance be obtained for the property. The agreement expired as a result of failure by the purchaser to comply with the suspensive condition.

[5.3.3] Subsequently a second offer was entered into with Justine Diamond as a sole purchaser, which agreement also lapsed as a result of finance not being obtained within the contractually agreed period.

[5.3.4] A third agreement was then concluded with Justine Mari Diamond and Casino Retail (Pty) Ltd as the purchasers ("the Intervening Party" herein), for the purchase price of R2,6 million and a cash deposit of R120 000 which was to be deposited with the appointed conveyancer on date of acceptance of the offer and the balance of R2, 48 million to be paid on transfer of the property and in respect of which security would be provided by a way of a bankers guarantee within 30 (thirty) days of approval of finance. The agreement was further subject to the Intervening Party, within 60 (sixty) days of signature, obtaining from a registered financial institution a loan of an amount of not less than R2,48 million and taking occupation from 1 June 2011.

[5.3.5] The parties also signed an addendum to this agreement in terms of which they agreed that the deposit could be transferred to the Respondent before registration of the transfer and in return the Respondent agreed that all moveable assets belonging to the deceased estate may be retained by the Intervening Party as security for the repayment of the deposit in the event that it should be refundable.

[5.3.6]The deposit was duly paid to the Respondent and the Intervening Party took early occupation on 1 May 2011. The

Intervening Party failed to obtain finance in respect of the balance of the purchase price by 28 July 2011 as stipulated in the agreement or within the extended period of 30 (thirty) days that the parties subsequently agreed upon, as a result the suspensive condition was not fulfilled.

[5.3.7] Respondent then launched proceedings at the South Gauteng High Court for the eviction of the Intervening Party from the property due to their failure to obtain approval of a loan from a financial institution. Further that the time period within which the mortgage bond was to be obtained was extended for a further 30 (thirty) days until 28th August 2011 and by that date the condition precedent was still not fulfilled, resulting in the agreement being cancelled.

[5.3.8] The Intervening Party is resisting the eviction Application on the basis that on 13 July 2011 it sent a letter to Respondent's attorneys to inform them that they could not obtain a bond because of certain defects in the property such as, *inter alia*, land use departure, no approved building plans and disrepair to certain improvements, alleging that the valuator from Standard Bank could not find value in the amount of the bond to be obtained,

[5.3.9]They further deny in their opposing affidavit as deposed to by Mari Justine Diamond that they are in unlawful possession and allege that:-

[5.3.10] They had consent from the Respondent, furnished to them in a letter dated 13 May 2011, to effect the repairs in the property and as a result have incurred certain charges for the repairs on the property for the sewerage lines, electrical connections and maintenance amounting to R617 000.00, with further repairs still to be effected to the thatched roof that amounts to R115 00.00.

[5.3.11] the finance approval could not be granted as the banks found the property to be worth only R2 million as a result of the defects with the seller breaching the contract.

[5.3.12]They have a right of retention in the amount of R733 683.69 for the amounts allegedly spent on the improvements and repairs and therefore entitled to a reduction of the purchase price to R1,3 million which is half the purchase price initially offered .

[5.4] The matter is still pending in the South Gauteng High Court, the Intervening Party remains in occupation of the property and are operating the facilities in the building, i e, the conference, restaurant

and accommodation and has not been paying occupational rent since September 2011.

[5.5] At the time when the property was inspected prior to signing of the agreement, the Intervening Party was represented by her husband Neil Diamond, a property broker and an estate agent that professes to be an expert valuer in the Alberton area. He attended at the property on various occasions and negotiated the agreement with the estate agent. He and the Intervening Party were fully aware of the exact state of the property at the time of signing of the agreement. The purchase price was negotiated and agreed upon in view of the state of the property.

[5.6] Although the Intervening Party took occupation on 1 May 2011, and allegedly effected repairs in June 2011 as it appears on the schedule of repairs they submitted, the defects were only pointed out in July 2011 and the letters dated 13 July 2011 omit to mention an important aspect that Respondent's consent was already obtained on 13 May 2011 as alleged in the opposing affidavit.

[5.7] The Respondent is denying that she is the signatory of the Consent letter and on Applicant's recommendation the letter was submitted for analysis of the signature by a forensic handwriting expert who concluded that the signature appearing on the alleged consent was not produced by the Respondent.

[5.8] The Respondent has not received payment of occupational rent from the purchasers from 1 September 2011 to date of Application and the purchasers allege to be paying it into their attorney's trust account.

[5.9] As a result of factual disputes raised by the Intervening Party in the eviction Application, Respondent was advised not to pursue the Application wherein she subsequently approached the Applicant as a forensic investigator to assist her with the administration of the estate, to investigate the affairs of the estate and the problems arising as a result of the issues raised by the Intervening Party on the terms of the offer to purchase.

[5.10] During the course of the investigation Applicant discovered that the property was encumbered by a first mortgage bond in favour of Nedbank of which more than R450 000.00 is still outstanding. The bond is not being serviced and in arrears as the estate is dispossessed of any funds to enable payment of the monthly instalments due in terms of the bond. As a result of the prevailing impasse with the purchasers of the only valuable asset in the estate, the estate is not earning any income in respect of the immovable property and the estate is not possessed of any funds to further the litigation.

basis that whilst he was appointed to assist with the winding up of the estate, Applicant has invoiced the Respondent for forensic work in the amount of R82 627.20 when he is neither an auditor or a forensic specialist. His claim is also not of a liquidated claim as is required by Section 9 of the Insolvency Act in that it is not capable of being promptly and easily ascertainable. The invoice fails to indicate how the amount is calculated, whether it is an hourly fee or day fee and the exact time spent on the matter. Alleging that the claim is disputed on *bona fide* and reasonable grounds as a result an order for sequestration ought not to be granted.

[10] The Intervening Party also disputes the Applicant's claim on the basis that this is a debt incurred by the Respondent in her personal capacity not a debt of or by the estate. As a result it should be deducted from the Respondent's share of the estate, alternatively it is an administrative costs incurred in the process of the administration of the estate that still needs to be approved by the Master and cannot be a claim to sustain a sequestration application. Arguing that the only debts that are to be taken into consideration are those that have been in existence at the time of the death of the testator.

[11] The Intervening Party further alleges that it has got a right of retention of the immovable property for the necessary costs of repairs it effected on the property in the amount of +-R733 683.69 and as a result the sequestration of the testator's estate should not be granted.

[12] It further denies that the property is insolvent and attaches an affidavit of an auditor who dealt with the estate in the administration thereof that confirms that the estate is solvent and alleges that the estate's debts do not exceed an amount of R1,100 000.00 excluding the Municipality Utility Bill of R186 000 and Tax to SARS in the amount of R100 000 whilst declaring its value to be more than R3,300 000.00. The Intervening Party also denies that the Respondent's illiteracy can be an excuse and allege that she has got the assistance of attorneys Van Vuuren or any of the attorneys that she requires.

[13] Now, as a sole member of the Applicant, Hennie Els does not need to have written authority for him to launch this Application or to sign the Founding Affidavit as he has alleged. In terms of the Close Corporation Act 24 of 1936, he is a statutory agent of the Close Corporation and has a statutory authority to act on its behalf, unless the power to do so is excluded as in accordance with Section 54 of the said Act.

[14] The Applicant has alleged that the Respondent, as an executrix of the estate, has committed an act of insolvency by indicating the estate's inability to pay his invoice that was issued for the investigative work it conducted to assist the Respondent in the administration of the estate. In her note to the Applicant, Respondent confirms the appointment of the Applicant, the receipt of his invoice and state that neither the estate nor herself are in a position to honour the invoice. Of importance rather, is that

Respondent as the debtor's representative does not dispute the claim of the Applicant. The onus on the Applicant to prove an act of insolvency is as a result discharged.

[15] Although this has got a making of a friendly Sequestration Application, none of the parties alluded to that fact. Applicant's Founding Affidavit is very detailed in its explanation of the affairs of the estate and elucidatory. In examining the Applicant's claim as according to his aforementioned invoice, it indicates the nature and the extent of the requisite services rendered and stipulates the amount charged to the estate. Some of the documents detailing the work done are annexed to the Applicant's Founding Affidavit in support of the Application. Section 9 (3) (a) (iii) of the Insolvency Act 24 of 1936 ("the Act) provides that the allegations in relation to the claim must indicate the amount, cause and nature of the claim and state that the debtor is liable for the claim. The Section does not provide that the creditor need to indicate or allege how the amount is calculated as is alleged by Applicant's counsel. In the context of the sequestration proceedings, a liquidated claim is a claim for an amount that is fixed either by agreement or by an order of court or capable of being easily and promptly ascertained.

[16] The mere fact that a claim is disputed does not make it an unliquidated claim. The court still has got to establish in the context of what the Act regards as a liquidated claim if there is a genuine dispute raised against the claim. So where the debtor disputes the creditor's claim the court

may, if satisfied that the debtors opposition is not bona fide and that the debt substantially exceeds R100, grant a sequestration order although unable to decide the exact amount of the debt. See ***Reynolds NO v Mecklenberg (Pty) Ltd*** 1996 (1A) SA 75 (W). The Intervening Party has not raised a challenge about whether or not the services were rendered and on the nature thereof. There is no contradictory evidence submitted on the extent thereof or to counter the amount charged to raise a genuine dispute of fact. Applicant has accordingly, established a liquidated claim against the estate such as is mentioned by Section 9 (1) of the Act. See Judgment of Zulman J in ***Braithewaite v Gilbert (Volkskas BPK Intervening)*** 1984 (4) 717 (W) where the following remarks of Murray J in ***Ex Parte Berson; Levin and Kagan v Berson*** 1938 WLD 107 at 115 were noted, that:

> "Though a debt is not unliquidated merely because it neither rests upon a judgement nor is it admitted by the debtor, yet when the debt is disputed it cannot be regarded as liquidated where as in this case its establishment obviously depended upon the determination of a number of questions of fact in dispute between the parties themselves and the consideration of contradictory evidence as to the nature of requisite services and the extent of a reasonable fee."

[17] The Act in Section 9 (2) also provides that a liquidated claim which has accrued but which is not yet due on the date of hearing of the Application, shall be reckoned as a liquidated claim for the purposes of subsection (1).

The significant date of determination is the date of the Application. The amount need not be payable at the date of institution of the sequestration proceedings but at least it must have accrued. See ***Saddure CC & Catt*** 1998 (2) SA 461 (SE). Section 34 of the Administration of the Estates Act 66 of 1965 actually provides for the determination of the solvency or insolvency of an estate on expiry of the period within which creditors have to lodge their claims with the executor or at any time before a distribution is made under Section 35. Section 44 (1) of the Act provides that the claim which it is sought to be proved must be liquidated and the cause thereof must have arisen before the date of sequestration or liquidated before sequestration. In ***Wilson's Estate v Giddy's Estate*** 1938 EDL 322 AT 337 in a claim for damages based on negligence in dealing with trusts funds, it was found that the fees due to an accountant after sequestration, for investigating the position arising from such negligence may be provable against the insolvent estate. Therefore the Intervening Party's argument that the claim or debt should have existed at the time of death of the insolvent is off the mark. Applicant has established a claim against the estate as is mentioned in Section 9 (1) of the Act that is provable against the estate as suggested in ***Braithwaite v Gilbert (Volkskas BPK Intervening***) above.

[18] In ***Smith v Porrit and Others*** 2008 (6) SA 303 (SCA) at par 11 and 4.20, it is stated that the grant of a Sequestration Order does not entail the final determination of the Applicant's claims

[19] The insolvency of the estate is challenged by the Intervening Party notwithstanding that this challenge contradicts its assertion of a claim of R733, 000.00 against the estate for the repairs that it allegedly effected on the immovable property that affects the solvency of the estate, and the declaration it made under oath in its Affidavit opposing the eviction proceedings by the Respondent where it is seeking to purchase the property for R1 300 000.00, that the property value is not more than R2 000 000.00. So, If the court takes into consideration the superficial debts, that is the Bond that has not been serviced since the Intervening Party moved into the immovable property and was owing in the amount of R450 000.00 at the time of launching this Application in January 2012, the utility bill that was not paid since September 2011 that Counsel for the Intervening Party was disagreeing that it forms part of a debt against the property in arrears in the amount of R186 000.00 and the amount of R100 000.00 owed to SARS, the estate is already burdened with a debt of R1 469,683.69 which amount has obviously escalated since January 2012, it becomes apparent that the proper administration of the estate under the executrix is being frustrated and is or will not be to the benefit of the creditors. if the sale proceeds in accordance with the terms of the Intervening Party the purchase price it seeks to pay will only settle the outstanding debts on the property and none of the other debts as they are clearly illustrated in the Statement of Debtors Affairs in the Applicant's documents will be able to be settled.

[20] The Executrix has filed a statement of affairs in support of the Application for sequestration of the deceased estate which clearly outlines the extent of the estate's indebtedness and also indicates and confirms the serious challenges she is confronted with. The estate has incurred more debts under her administration which at the time of bringing this Application were standing at R4 261 429 whilst the value of the assets is supposedly R3 300 000.00 and on a forced sale might yield proceeds of a sum of R2 700 000.00 only as dividend of 50c in a rand will be available to creditors. Consequently the estate is *de facto* insolvent which makes the forced sale more to the advantage of the creditors then the offer of the Intervening Party. The accountants that assisted Respondent in the administration of the estate confirm that the estate is unable to pay its creditors.

[21] Whilst administering the estate the Executor has been burdened with a personal debt for legal costs arising from the eviction proceedings that she instituted to free the property from the possession of the Intervening Party so that it can be realised. She also has been made to sign an acknowledgement of debt for legal costs for the administration of the deceased estate in the amount of R198 000.31, which debt should obviously be carried by the estate but due to her naivety she has agreed to sign in her personal capacity.

[21] In circumstances similar to the aforementioned it is in the discretion of the court whether to grant order that the administration of the deceased estate be by way of Insolvency Act 24 of 1936 or Administration of Estates Act 66

of 1965. In ***Standard Bank of South Africa v Van Zyl No 7 Others*** 1999 (2) SA 223, it is recommended that the following circumstances be taken into consideration:

[21.1] the size of the estate;

[21.2] the complexity and possible complications inherent in the administration of the estate and

[21.3] in what respects each Act offers best method of dealing with such problem;

[21.4] the competence and independence of the executor of the deceased estate;

[21.5] the costs of the various methods.

[21.6] the wishes of the creditors and the size of theApplicant's claim.

[22] It has been alleged by the Applicant that all the creditors are in support of the Application including the beneficiaries from the will and none of them indeed has filed any opposition to the Application. Applicant also outlined the challenges that Respondent encountered in handling the administration, mainly that she has been overwhelmed and frustrated in her dealings with the Intervening Party and is certainly not coping with the general administration due to her inexperience and has been put in a capricious position which now inevitably warrants the intervention of a third party that is independent and competent to deal with the estate decisively. The assistance she has been getting from the accountants and attorneys that she instructs has proven to be more oppressive in the

sense that it worsened her circumstances. Under the circumstances the placing of the deceased estate under sequestration and the appointment of a trustee who will be able to investigate all the claims and conduct a proper search of the assets and collect its debts seems to be the best method and appropriate procedure to deal with the problems encountered by the Respondent and will benefit the creditors including the heirs.

[23] It is also important to note that the proceedings at the South Gauteng high Court are for the eviction of the Intervening Party and are to be determined on the basis whether the Intervening Party is in lawful possession of the property or not and they can therefore not form a basis or be a motivation for the refusal of the Sequestration Application. On the other hand, the placing of the estate under sequestration puts the trustee in a position to take possession of all the assets, genuinely examine and investigate all the claims against the estate including the Intervening Party's claim and in fairness to all other creditors distribute the proceeds accordingly.

[24] I therefore am satisfied that the interest of the creditors will be served if the estate is administered in terms of the Insolvency Act rather than of the Administration of Estates. In addition the Applicant has also satisfied the court that he has a liquidated claim and that an act of insolvency has been committed by the Respondent for a final order of sequestration.

[24] The Intervening Party as conceded by Counsel for Applicant does indeed have a potential real and substantial interest in the matter if it succeeds to prove its claim for allegedly effecting the repairs at the instance and consent of the Respondent on the immovable property in the deceased estate.

As a result, It is ordered that:

[23.1] The Application for Casino Retail (Pty) Ltd to intervene is granted.

[23.2] That the estate of late Deon Fourie with master reference 10991/2010 be and is hereby final sequestrated.

[23.3] Intervening Party to pay the costs in the sequestration Application.

NOMSA V KHUMALO

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

Date heard: 27 August 2012

Date of Judgment: 26 October 2012

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