IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

9/11/2012.

CASE NUMBER:61556/12

In the matter between:

KHANYEZA CHRISTOPHER JUNIOR **APPLICANT**

And

LIQUIDATORS ON CALL CC **FIRST RESPONDENT**

PARK VILLAGE AUCTIONS **SECOND RESPONDENT**

JUDGMENT

TLHAPI J

[1] The above application was dismissed and judgment was reserved for my reasons and to consider the application on behalf of the respondents for a costs order *de boniis propriis* against the attorney for the applicant.

This application was brought on urgency for the following relief:

"2. That the first and second respondents be interdicted from selling the

following properties at auction on the 29 October 2012:

2.1 103 Azalea Avenue (Erf 330 measuring 880 sqm) Country View Extension 3, Midrand;

2.2 62 Azalea Avenue (Erf 247, measuring 957 sqm) Country View Extention 3 Midrand;

3. That the respondents be ordered to pay costs of this application on a scale as between attorney and client;"

BACKGROUND

[2] The applicant brought this application in his personal capacity, seeking to interdict the auction of the above mentioned properties on the 29 October 2012 and, pending the finalization of a rescission application scheduled for hearing in the above Court on the 5 November 2012. His estate was finally sequestrated by the above court on the 1 February 2011 under case number 52844/2009 . On the 22 March 2012 the Master of the High Court appointed Paula van Heerden and Abdul Baaki Tayob as final Trustees under certificate T0543/11.

[3] The applicant averred that the application for rescission was served on the first respondent on the 4 April 2012 and that the respondent had gone ahead with their intention to auction the property, fully aware that a notice of set down had been served and that there was a pending application for rescission

of judgment before this court. The notice of set down of the rescission application was served on the 10 October 2012 .

The applicant averred further that his attorney called one of the trustees on Friday the 19 October 2012 and there was no response, A lengthy message was left relating to the rescission application. When there was still no response the applicant's attorneys tried to call the first respondent in an attempt to settle the matter. Several letters followed from the applicant's attorney between the 17 and 22 October 2012 the last being a letter forewarning the respondents that the applicant intended launching an urgent application. The applicant's attorney was called by one Carol from the offices of the second respondent who indicated that the sale would only be stopped on instructions of the first respondent.

[4] The applicant averred that the first respondent was aware at all times that a rescission application was to be brought to rescind the order of sequestration and they persist to proceed with the 'sale in execution" and that if the "sale in execution" was not stopped he would suffer immense prejudice and would loose the home he had resided in for many years. A copy of the rescission application was attached to the founding affidavit and not the sequestration application. The respondents in the rescission application were Stone Ridge Country Estate Home Owners Association, Absa Group Ltd and Nedbank Group Ltd.

[5] The opposing affidavit was deposed to by one of the trustees Paula van Eeden. She raised the following points in limine:

5.1 that the applicant lacked *locus standi* to launch the application;

5.2 that the application was fatally defective in that there was a material mis-joinder and a material non-joinder; that the applicant had failed to cite the joint trustees who had jointly taken the decision to auction the properties; that the first respondent was not a trustee of the insolvent estate;

[6] Ms van Eeden averred that the applicant was hopelessly insolvent and she annexed a letter (undated) from one of the creditors which read:

> *"kindly take note that Nedbank only received a payment of R15,000.00 on 1/02/2011 and R9,000.00 on 4/3/2010 since the client was sequestrated on the 25 October 2010. We hereby confirm that the current arrears totals up to an amount of R272 084.14. We hereby confirm that the current outstanding balance on the account totals up to an amount of R876 739.75"*
>
> (the 25 October 2010 was the date of provisional sequestration)

Furthermore, she stated that the applicant had no realisable assets of value, that his liabilities exceeded his assets and, that he had not since sequestration made a single payment to Nedbank to reduce the bond obligation nor bothered to pay rates and taxes and levies on the properties above. He continued to reside on one of the property and she annexed the

latest municipal account reflecting the recent outstanding amount of R32 367.00.

[7] Although the rescission application was served, neither of the trustees had been cited in such application. Ms van Eeden averred that during the latter part of June 2012 her assistant Ms D Stiemie was informed by the applicant's attorney, a certain Mr Ndlovu that the rescission application had been refused. A letter followed informing the attorney that the trustees were scheduling a second meeting of creditors and that the Master of the High Court would be approached to adopt the resolutions of such meeting and that they would proceed with the sale by public auction. This letter was sent by facsimile and the report also annexed to the answering affidavit confirmed that the letter was received by Mr Ndlovu's office on the 25 June 2012.

[8] Ms van Eeden averred that the court would be requested to dismiss the urgent application and to order costs *de bonis propriis* in that in not allowing such costs would mean that the applicant was entitled to litigate against the trustees with creditors funds.

[9] Applicant's Locus Standi:

After appointment the trustees are vested with the dominium of the insolvent estate assets. The insolvent is divested of his property subject to certain exceptions as provided for in the Insolvency Act. The trustees deal with the property vested in them for the benefit of the *concursus creditorum* thus established. In relation to this application and the order sought, the matter is

not about a sale which is as a result of a sale in execution of property obtained through an order of court in default judgement applications. It was a sale by public auction as approved by the creditors, authorised and regulated in terms of the Insovelncy Act. The trustees vest with the power to litigate over the assets of the insolvent estate.

[10] Joinder and Mis-Joinder:

The Applicant was aware that sequestration proceedings were launched against him. The application was personally served on him on the 10 August 2010. The provisional order was also personally served on the 17 January 2011. On the 8 July 2011 his attorneys made enquiries on his behalf and required copies of the application for sequestration, the orders of provisional and final sequestration, the return of service of the provisional sequestration order and the contact details of the trustees. On the 12 July 2011 the attorneys for the creditor Stoneridge Country Estate provided the attorneys of the applicant, a copy of the return of service of the application, a copy of the provisional order, a copy of the return of service of the court order and the contact details of the appointed trustee, Paula van Eden.

In relation to the sequestration and the consequences that flow from such process, by law, the first and second respondents should not have been cited as respondents. It was the individual trustees, appointed by the Master of the High Court who had substantial interest in the matter, because they administered the insolvent estate in the interests of the creditors. The Master should also have been cited as a respondent because the administration of the insolvent estate occurs under his supervision.

[11] The conduct of the attorney and Costs de bonis propiis:

1. The attorney knew as far back as July 2011 that his client's estate had been sequestrated and that a trustee had been appointed. It does not seem that effort was taken by him to confirm the status and progress made in the administration of the insolvent estate with the Master of the High Court. A serious duty is therefore placed on a legal advisor and/or attorney to display diligence and, professional knowledge in the law when he undertakes to represent a client. Where he is not exposed to such knowledge it is expected that he would call for further advise and legal opinion. Given the information at his disposal he should not have launched an application against the respondents and by doing so he acted negligently.

2. The consequences of sequestration are such that the creditors now look to the assets in the insolvent estate for payment of their claims. All the costs of sequestration, claims and trustees fees are paid out of the proceeds of sequestration. In most cases creditors don't lodge claims because of the risk of a contribution and, when they do get paid, far less than what was initially owed is paid out. Albeit that the incorrect respondents were cited the applicant in this application sought costs on an attorney and client scale. The question is who must pay the costs in the circumstances. It is not the respondents or the trustees, but the creditors who shall have to bear such costs. The applicant was insolvent and one could not look to him for payment of the costs of this application and the attorney in my view should have known about this.

[12] Our courts have ordered costs de bonis propiis against attorneys where the court was satisfied that the conduct displayed warranted such order; **SA Liqour Traders' Association v Gauteng Liquor Board 2009(1) SA 565 (CC) at para 54; Jeebhai v Minister of Home Affairs 2009(4) SA 662 (SCA); Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd 766 (SCA).**

I am satisfied that in this case a costs order on a punitive scale should be made against the applicant's attorneys.

[13] The application was dismissed on the points *in limine* raised.

[14] In the result the following order is given:

1. The application is dismissed.
2. The applicant's attorney is ordered to pay costs *de bonis propriis* as between attorney and client.

TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	26 OCTOBER 2012
JUDGMENT RESERVED ON	:	26 OCTOBER 2012
ATTORNEY FOR THE APPLICANT	:	NDLOVU & TSHIMBANE ATT

ATTORNEYS FOR THE RESPONDENT : STUART V/D MERWE ATT