NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: 1970/2014

JAMES SHOLTO DOUGLAS N.O.
in his capacity as trustee for the time being of the
PENNYPINCHERS PORT ALFRED BUILDING MATERIALS
TRUST (IT 584/2007)
First Applicant

WAYNE DEON OPPERMAN N.O.
in his capacity as trustee for the time being of the
PENNYPINCHERS PORT ALFRED BUILDING MATERIALS
TRUST (IT 584/2007) Second Applicant

THEODORE LE ROUX DE KLERK N.O.
in his capacity as trustee for the time being of the
PENNYPINCHERS PORT ALFRED BUILDING MATERIALS
TRUST (IT 584/2007) Third Applicant

WK CONSTRUCTION (PTY) LTD Fourth Applicant

And

GOBO GCORA CONSTRUCTION AND

PROJECT MANAGEMENT CC First Respondent

SIPHO GCORA Second Respondent

KHUSELWA BEAUTY GCORA Third Respondent

WERNER DE JAGER N.O.
in his capacity as co-trustee of the Second and Third Respondents acting under and by virtue of a Certificate of Appointment of Trustees issued by the Master of the High Court dated 28 March 2014 Fourth Respondent

LAYLA LIMBADA N.O.
in her capacity as co-trustee of the Second and Third Respondents acting under and by virtue of a Certificate of Appointment of Trustees issued by the Master of the High Court dated 28 March 2014 Fifth Respondent

KOUKAMMA MUNICPALITY Sixth Respondent

NATIONAL URBAN RECONSTRUCTION AND HOUSING AGENCY (PTY) LIMITED Seventh Respondent

TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD Eighth Respondent

JOINT EQUITY INVESTMENTS IN HOUSING (PTY) LTD Ninth Respondent

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JUDGMENT

CHETTY J: -

On 3 December 2013, the estates of the second and third respondents were finally sequestrated by order of this court. The effect of the order was, pursuant to the provisions of s 20 (1) (a) of the **Insolvency Act** (the Act)[1],

> "(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;
>
> (b) . . ."[2]

[2] On 11 December 2013, the second and third respondents filed a document styled, **"Rescission Application"** in which they sought relief formulated as: -

> "1. Condoning the Respondent's possible non-compliance to any Rules of the above Honourable Court as the papers have been prepared by lay persons.
>
> 2. An order rescinding the confirmation of rule nisi on 03 December 2013 a day during which the Respondents expected a date for the hearing of their rescission application which was filed on 19 December 2013 to be agreed upon as rule nisi could not be confirmed on 26 December 2013 due to the said rescission application.

[1] Act No, 24 of 1936

[2] The fourth and fifth respondents were appointed as joint trustees in the insolvent estate on 28 March 2014.

3. Rescinding the Order permitting the Intervening Creditors under case number 2919/13

4. An order compelling Concrete 4 U to honour an undertaking it gave to the Applicants under case number 1089/13 to await the conclusion of the claims of the Respondents against NMBM and WK Construction

5. . . ."

[3] Consequent upon their final sequestration, the second and third respondents, both in their personal capacities and purportedly on behalf of the first respondent not only continued their embroilment in the litigation with the fourth applicant (as appears from the aforegoing notice of motion) and sixth respondent, but instituted a plethora of litigation against Penny Pinchers and the seventh to ninth respondents in which they sought disparate relief.

[4] The institution of proceedings against Penny Pinchers elicited a swift riposte By letter, dated 17 June 2014, the second and third respondents, as erstwhile members of the first respondent, were appraised that apropos the application launched by it, that: -

"3.1 The Members Interest in GCC was, prior to your final sequestration, held by yourselves;

3.2 On 3 December 2013, the Port Elizabeth High Court issued a Final Sequestration Order in respect of yourselves, a copy of which is attached marked "A";

3.3 Whilst you have initiated an Application for the rescission of the Final Sequestration Order in terms of Section 149 of the Insolvency Act No. 24 of 1936 (the "Act"), such Application does not suspend the Final Sequestration Order;

3.4 In terms of Section 20 (1) (a) of the Act, the effect of the sequestration of the estate of an insolvent shall be *"to divest the insolvent of his estate and to vest it in the master until a trustee has been appointed, and upon the appointment of trustee to vest the estate in him"*;

3.5 A trustee has indeed been appointed to your insolvent estate, in confirmation of which I attach a copy of the Certificate of Appointment of Trustees issued by the Master of the High Court, marked "B";

3.6 By virtue of the aforegoing, your Members Interest in GCC vests in your appointed trustees, and you have no authority to deal with the affairs of GCC whilst such state of affairs exists;"

[5] The anticipated cooperation was however, not forthcoming, necessitating the launching of this application, in which the applicants sought a temporary interdict, as one of urgency, against the respondents in the terms foreshadowed in the letter referred to hereinbefore. A notice of opposition, ostensibly from the first to third

respondents ensued, followed by a **"filing notice"** incorporating the second respondent's answering affidavit. Shorn of its vitriol, irrelevant and argumentative content, the opposition to the relief sought is confined to the contention that the filing of the rescission application suspended the operation of the final order of sequestration by virtue of the provisions of Rule 49 (11) of the **Uniform Rules of Court**. On the morning of the hearing, i.e. 26 June 2014, a further document, styled **"Notice of Motion – Counter Claim"**, bearing the same citation of the parties but with additional respondents was filed in which the second and third respondents sought a plethora of frivolous, vexatious and largely unintelligible orders. The accompanying affidavit by the second respondent is, *qua* the notice of motion, replete with similarly argumentative and irrelevant matter.

[6] At the inception of the hearing, I was informed by Mr *Gajjar*, who appeared on behalf of the seventh, eighth and ninth respondents, that they abide the decision of the court. I interpolate to say that the fourth, fifth and sixth respondents adopt a similar stance.

[7] The second respondent's contention that the filing of the rescission application suspended the operation of the final sequestration order is entirely misplaced. Section 150 of the Act provides as follows: -

> "(1) (1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration

may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.

(2) Such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all rules applicable to such last-mentioned appeal shall mutatis mutandis but subject to the provisions of subsection (3), apply to an appeal under this section.

(3) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.

(4) If an appeal against a final order of sequestration is allowed, the court allowing such appeal may order the respondent to pay the costs of sequestrating and administering the estate.

(5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section."

The proviso to ss1 (1) and reference to s 20 (4) and (5) of the **Supreme Court Act**[3] moreover enjoins an aggrieved debtor to seek leave to appeal. Even when an appeal is noted against a final sequestration order, the sequestration follows its normal course and the provisions of the Act apply as if no appeal has been noted. The Act

[3] Act No, 59 of 1959

specifically excludes the common law rule that the execution of a judgment is automatically suspended upon the noting of an appeal.

[8] Although s 149 empowers a court to rescind any order made by it under the provisions of the Act, the section cannot be invoked as authority for the proposition that the mere filing of a notice of rescission suspends the operation of a final sequestration order. Nor does Rule 49 (11) assist the second and third respondents. Its reach is of limited application and confined to matters where an appeal has been noted or leave to appeal has been sought or granted. The opposition to the relief sought is entirely misplaced.

The Counterclaim

[9] The content of both the "**notice of motion-counterclaim**" and the accompanying affidavit deposed to by the second respondent may properly be categorised as drivel. The relief sought is vexatious and constitutes an abuse of the process of this court and falls to be dismissed.

[10] In the result, the following orders will issue: -

1. The second and third respondents are hereby interdicted and restrained from:

1.1 authorizing the initiation, pursuit or defence of any legal proceedings of any nature by the first respondent;

1.2 directly and/or indirectly participating in the management of the business of the first respondent in contravention of section 47 (1) (b) (i) of the **Close Corporations Act** *69 of 1984*;

2. All legal proceedings in which the first, second and third respondents are involved, including but not limited to those against the applicants, excluding legal proceedings the second and third respondents are permitted to embark upon in terms of section 23 of the **Insolvency Act** *No. 24 of 1936*, are hereby suspended pending the determination by the fourth and fifth respondents that any one or more of such legal proceedings should be persisted with, which determination the fourth and fifth respondents are directed to make on or before 30 October 2014.

3. The costs of this application are to be regarded as an administration expense in the insolvent estate of the second and third respondents.

4. The counterclaim is dismissed.

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D. CHETTY

JUDGE OF THE HIGH COURT

Delivered:	27 June 2014
Obo the Applicants:	Adv J.D. Huisamen SC
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2nd Respondent:	In Person 15 Wattlewoods, Macon Road, Lorraine, Port Elizabeth
Obo the 7th, 8th and 9th Respondent:	Adv G. Gajjar
Instructed by:	Rushmere Noach Inc 5 Ascot Office Park, Conyngham Road, Greenacres, Port Elizabeth Ref: J Theron Tel: (041) 399 6700