118/94

CG CASE NUMBER: 102/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CYNTHIA DINA HIRSCHOWITZ Appellant

and

RAYMOND MORRIS GILINSKY Respondent

CORAM: VAN HEERDEN, KUMLEBEN et

VAN DEN HEEVER JJA

HEARD ON: 5 SEPTEMBER 1994

DELIVERED ON: 15 SEPTEMBER 1994

J U D G M E N T

VAN DEN HEEVER JA

Appellant and her husband are married out of community of property. She is a nursery school teacher, he an insurance agent in the employ of Norwich Life Insurance Company ("Norwich"). In 1983 a residential property known as 4 Johnson Road, St Andrews in Bedfordview was registered in her name. This is encumbered by a mortgage bond in favour of Norwich.

Respondent lent money to Mr Hirshowitz who on 20 May 1991 signed an acknowledgement that the sum of R369 000 was due and payable by him. On the same day appellant bound herself as surety and co-principal debtor to respondent for this debt of her husband's.

Respondent obtained summary judgment against the couple jointly and severally on 13 August 1991 for this unpaid capital amount, interest and costs. The deputy sheriff rendered a *nulla bona* return in respect of Mr Hirshowitz. Appellant too failed to satisfy the judgment debt, and the sheriff attached household furniture listed in his return which is clearly inadequate to cover the amount in issue. Respondent then on 11

September 1991 launched an application to sequestrate her estate.

The application was careless and required to be supplemented by various affidavits, but led to the grant of a provisional order of sequestration. No opposing affidavit was filed by appellant herself, the only factual opposition consisting of an ambiguous affidavit by Mr Hirshowitz. On the return day of the rule *nisi* which had been extended when the matter was postponed many times, argument was advanced that no benefit of creditors had been established. The court *a quo* held that it had been shown that appellant was insolvent and that benefit to creditors was perhaps slight, but was there. The rule was confirmed.

Appellant noted an appeal against the sequestration order but was singularly remiss in complying with the rules of court relating to the prosecution of the appeal. She requires condonation before her appeal can be heard, and a petition was filed in that regard. Respondent, too, requires condonation: for failing to file a power of attorney along with his heads of argument. His counsel informed the court that by agreement

between the parties neither application for condonation would be opposed. That, however, is not the end of the matter, since although consent by the opposition is a factor to be considered in the exercise of its discretion, the court is not bound by such consent. (P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A).

According to appellant's petition, what happened after the appeal had been noted (on 6 March 1992) was as follows:

The attorneys argued about the amount of security appellant was to provide, respondent's attorney demanding an excessive amount. The parties ultimately agreed on R12 000, which she had difficulty in raising on her salary with a young family to provide for. It was only "during or about August 1992" that she was able with the assistance of relatives to provide security in this reduced sum.

The record (a single volume) was not prepared timeously. Six copies should have been lodged within three months of the final order or

such further period as respondent might agree to. The judge had however neither corrected nor signed the typed version of the judgment he had given orally in court. Respondent was asked by letter, dated 18 June 1992, for a six weeks' extension of time to lodge the record. This was refused. The copy of the two-page judgment annexed to her petition shows that it was signed as having been corrected on 2 July 1992. Appellant herself says nothing at all to explain why the record was lodged only on 22 March 1993 after the petition for condonation had been filed, on the 17th. The only information we have about the delay, is contained in an affidavit to which appellant herself does not refer in her petition, headed "Affidavit in support of the Petition for Condonation", deposed to not by appellant's attorney but his secretary Ms Fine. She says that the completed record had been prepared and security received in trust "by August 1992". There is no explanation whatsoever why it was not immediately lodged. She merely says that "during or about October 1992", therefore two months later, her employer handed

her the Petition for Condonation and the verifying affidavit which was to be signed and attested to by appellant. She was told to forward the required copies of the record to the firm's Bloemfontein correspondent, and to write to Mr Krowitz confirming that her employer was holding the security agreed upon, in trust. Appellant signed and verified the petition on 1 November. Ms Fine returned it to the file. Then her husband fell ill during November, he was hospitalised, she was away from office first to attend to him and, after his release, to accompany him on holiday, returning to work only on 11 January 1993. It was only when Mr Hirshowitz delivered a letter addressed to appellant by his trustees giving her six weeks' notice to vacate 4 Johnson Road since the property was to be sold, that Ms Fine started looking for the appellant's file which had in the meanwhile been mislaid.

There is no explanation whatsoever for the two month hiatus between August when the record was ready, and October when she was told to send it off; nor of what arrangements, if any, were made to

attend to clients' interests during the absence of the attorney's secretary on her own affairs.

Appellant was left in the lurch not only by her attorney, but also by counsel who had filed heads of argument but gave notice at the last moment that he would not be appearing on her behalf. The matter had been set down for 5 September, which would be awkward for him: he wished to be home in Johannesburg before sundown because of the Jewish religious holiday. Respondent's team refused to agree to a postponement to a later date. The court had agreed to accommodate appellant's counsel by starting early to allow him ample time, should he come by car, to return timeously, but counsel decided - according to appellant, who appeared in person - that the concession was insufficient.

Appellant commenced her address to court by asking that the matter be referred to the Constitutional Court on the grounds that her right to be represented by a lawyer of her choice and his right to religious freedom were somehow being infringed - a proposition so

singularly unmeritorious than no more need be said about it.

I have set out the allegations in the application for condonation in fairly detailed fashion. Those allegations reflect a laxity in regard to the rules of court that amounts almost to contempt. Although the fault lies at the door of her attorney rather than that of appellant, there is a stage beyond which the court will not be disposed to come to the assistance of a litigant on that score alone, regardless of the merits or demerits of the appeal itself. The record before us however satisfies me that no injustice will be done to appellant should her application for condonation be refused.

Facts that emerge from the petition along with its supplementary affidavits and the affidavit of Mr Hirshowitz, may be listed as follows:

The Bedfordview house was valued at R750 000.

The bond on this property in favour of Norwich was passed within the six months preceding the provisional sequestration of her estate, appellant having signed the relevant power of attorney on 24 June 1991.

Mr Hirshowitz told respondent that the bond was passed to secure money to be lent to him by Norwich; and told respondent's attorney Mr Krowitz during an interview in the attorney's office that his and appellant's indebtedness to Norwich was less than R800 000 but had "pre-existed the lodgment of the Bond by a considerable time, and well in excess of two months".

It appeared from Hirshowitz's affidavit that the bond was for R800 000. I call his affidavit ambiguous, because in it he quarrels with Mr Krowitz for having got Norwich's name wrong, and denies irrelevant features of the interview between them - for example, who requested it. He also denies that there was any discussion between them "about any indebtedness to my employees (sic)" and points out that according to respondent, he, Hirshowitz, had informed respondent of a *causa* for the bond different to the one mentioned to Krowitz.

The application alleged that appellant and her husband had been involved in large transactions over the preceding years and a number of

prior bonds had been passed over the Bedfordview property and cancelled again, and that, on sequestration, search by a trustee might lead to the discovery of further assets. Moreover there was a reasonable prospect that the Norwich bond could be set aside so that respondent and other creditors of appellant could share in the proceeds of a sale of the house. Without sequestration of appellant's estate respondent would be left out in the cold and only Norwich, a creditor in the first instance of Mr Hirshowitz, would benefit from the sale of the house by virtue of the suspect bond.

The best proof of solvency is payment of one's debts. It was not seriously contended that the court *a quo* erred in finding it proven that appellant was unable to do so despite the many postponements and extensions of the rule which could have been sought with no other purpose in mind than to give her the opportunity to do so.

The point was not taken on behalf of appellant either in the court *a quo* or before us, that what her husband said to either respondent or his

attorney was inadmissible against appellant. His utterances of course do not prove the truth of the matters asserted. However, the fact that he made such statements (or "a statement", in view of his denial of the conversation Mr Krowitz alleged) read with the nature of his comments, or the lack thereof, in his affidavit, provide circumstantial corroboration of respondent's allegation that the validity of the preference afforded Norwich by the bond needs to be investigated. Where appellant went to the trouble of filing an affidavit by her husband at all, one would have expected it to say more than it did. He merely denied the content of the admitted conversation with Mr Krowitz, but did not deny saying to respondent what respondent says he did.

According to that utterance, he knows what the purpose of the bond was, and that it related to his own liability towards Norwich. The fact that he does not set out facts which would allay suspicion of the bond, is cause for added suspicion. On the probabilities sequestration will "secure some useful purpose" as envisaged in Hillhouse v Stott;

Freban Investments (Pty) Ltd v Itzkin; Botha v Botha 1990 (4) SA 580 (W) at 585 E-F, referring back to the earlier decision in Meskin & Co v Friedman 1948 (2) SA 555 (W). 558-9. Moreover, Norwich ultimately filed an affidavit in which it, too, supported the application.

It is not only appellant's legal advisers who were at fault. In his application for condonation for late filing of his power of attorney, respondent's attorney gives as reason for this omission merely that he was unaware of the requirements of the rule. Moreover, he improperly attempts to introduce as an annexure to his petition evidence, adverse to appellant, of events which occurred after she had been finally sequestrated.

In the result, appellant's application for condonation is refused with costs which include the costs of appeal.

Respondent's application for condonation is granted, respondent to pay any costs occasioned by it.

L VAN DEN HEEVER JA

CONCUR:

VAN HEERDEN JA)

KUMLEBEN JA)