founded the alleged impossibility of complying with s 113(1) solely upon the contention that in terms of the regulations he was precluded in law from seeking any treatment for his injury other than that arranged for him by the Surgeon-General. The question whether, apart from the regulations, appellant could reasonably have ascertained the true facts concerning his injury and the diagnosis made by Dr Schlosberg before 11 October 1983 was not raised on the pleadings and was consequently not investigated at the hearing before Eloff J. Had it been an issue on the pleadings, the trial of this matter would probably have taken a very different course. It is likely, in particular, that additional evidence would have been placed before the Court *a quo*. Accordingly, I do not think that it is now open to appellant to raise this argument.

The point concerning unconscionable conduct, raised in the replication, was not separately argued before us. It appears to be based on the same premise as the contention of impossibility, viz the unlawfulness of appellant seeking treatment and advice from a private medical practitioner, and consequently it must fail for the same reasons.

I am therefore of the view that the Court *a quo* came to the correct conclusion. I do so with some regret because, as I have already mentioned, there seem to be strong equitable reasons why an expiry period such as provided for by s 113(1) should be subject to a proviso similar to that afforded by s 12(3) of the Prescription Act 1969 for prescriptive periods. But that is a matter for the Legislature.

The appeal is dismissed with costs.

Hefer JA, Grosskopf JA, Vivier JA and M T Steyn AJA concurred.

Appellant's Attorneys: *Biccari & Wentzel*, Johannesburg; *Rooth & Wessels*, Pretoria; *Webbers*, Bloemfontein. Respondent's Attorneys: *State Attorneys*, Pretoria and Bloemfontein.

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EPSTEIN v EPSTEIN

CAPE PROVINCIAL DIVISION

SELIGSON AJ

1986 November 7; December 1

Insolvency—Compulsory sequestration—Application for—'Friendly sequestration'—Such 'friendly' applications will not preclude the grant of a provisional order when requirements of s 10(a),(b) *and* (c) *of the Insolvency Act 24 of 1936 are genuinely satisfied—But Court should scrutinise such applications very carefully to protect interests of creditors—Such applications brought primarily for the relief of the respondent and interests of creditors of secondary importance—Such not the object of Act—Voluntary surrender the more appropriate procedure in such a case—Friendly sequestration based on s 8*(g) *of the Act should not be granted unless it is clear that the general body of creditors will benefit.*

Magistrate's court—Civil proceedings—Execution—Committal to prison for contempt of court for failing to pay a debt in terms of an order made under s 65A of the Magistrates' Courts Act 32 of 1944—Clear from s 65F(3) that a judgment debtor who is bona fide *unable to pay through lack of means is immune from such committal—Committal only sanctioned if debtor wilfully refuses to obey court's order.*

Whilst the fact that an application for compulsory sequestration is a 'friendly sequestration' will not preclude the grant of a provisional sequestration order when the requirements of s 10*(a)*, *(b)* and *(c)* of the Insolvency Act 24 of 1936 are genuinely satisfied, the Court should scrutinise such applications with particular care in order to protect the interests of creditors. Where the application has been brought primarily for the relief of a harassed debtor, the interests of creditors are of secondary importance. This is not the object of the Insolvency Act, nor was it ever intended that the compulsory sequestration procedure thereunder should be used for the purpose of aiding or shielding harassed debtors. The more appropriate procedure for a debtor in such a position is the voluntary surrender of his estate in respect of which procedure ss 4 and 6(1) provide certain statutory safeguards. The Court should not readily encourage the avoidance of the statutory safeguards for creditors by sanctioning recourse to a friendly sequestration via the easy route of s 8*(g)* of the Act, unless it is clear that the general body of creditors will benefit.

It is clear from the provisions of s 65F(3) of the Magistrates' Courts Act 32 of 1944 that a judgment debtor who can show that he is *bona fide* unable to pay a debt, which he has been ordered to pay in terms of s 65A of the Act, through lack of means is immune from imprisonment for contempt of court. The statute does not provide for civil imprisonment of a debtor for a failure to pay his debts *per se*. Committal to prison is only sanctioned in the event of the debtor's wilful refusal to obey the court's order and as a penalty for his contempt of court.

Application for a provisional order of sequestration. The facts appear from the reasons for judgment.

L Weinkove for the applicant.

Cur adv vult.

Postea (December 1).

Seligson AJ: This is an application for a provisional order sequestrating the respondent's estate. It is a palpable example of what has come to be known as a 'friendly sequestration'. The applicant is the respondent's mother. The act of insolvency relied on is respondent's plaintive notification to her in a letter dated 21 September 1986 that he is unable to repay to her a loan of R6 000, cannot raise any moneys to pay his debts and is

'. . . hopelessly insolvent and desperate because several creditors have threatened to have me committed to gaol by issuing court process against me for the non-payment of these debts'.

It appears from applicant's founding affidavit that respondent is employed by her as a manager of a business in Woodstock which belongs to her and is called 'Mr Robot Video'. He earns a salary of about R900 per month, his exact income being dependent upon the amount of business generated. It further appears that respondent is married, has no assets at all and is in receipt of financial assistance from his wife's family. Respondent formerly ran a furniture business, Robot Furnishers, through a company, Robot Enterprises (Pty) Ltd, of which he is a director, but he got into serious financial difficulties and stopped trading in October 1985. Arising from his conduct of Robot Furnishers, respondent became indebted to a number of his creditors as surety for the debts of his business. It is alleged that in two instances applications are pending in the magistrate's court, Cape Town, to have respondent committed to gaol for failure to make payments to creditors, presumably pursuant to s 65A(1) of the Magistrates' Courts Act 32 of 1944. I shall return to this aspect later.

A schedule of respondent's creditors (excluding the applicant) reflects the following:

Shaw group of companies (personal suretyship)	R6 823
Barclaycard	3 618
Receiver of Revenue (general sales tax)	7 428
(income tax)	5 467
Trust Bank of Africa Ltd (debtors ceded in an amount of 11 000)	12 000
Mr C Rebeck (creditor of Robot Enterprises (Pty) Ltd)	5 000
Total	R40 336

The amount owed to the Trust Bank is potentially less than R1 200, inasmuch as the Bank has some security by way of a cession of the book debts of Robot Furnishers in an amount of R11 000.

It is alleged by applicant that there is no possibility of respondent being able to meet his liabilities at all. However, applicant avers that respondent's father-in-law has undertaken to pay into the trust account of applicant's attorneys the sum of R2 500 for distribution amongst the creditors of respondent after meeting the costs of sequestration. This has been done

> '. . . on the strict understanding that this amount will be paid into the said trust account if the respondent is placed under sequestration so as to prevent him from being committed to gaol'.

In a supporting affidavit applicant's attorney, Mr Kaplan, confirms that this amount has been paid into his firm's trust account and that the costs of sequestration should not exceed R1 500. This means that there will be an amount of R1 000 for distribution amongst respondent's creditors if his estate is sequestrated. It is also suggested by the applicant that this amount would be supplemented by 'so much of his monthly salary as would be fair and equitable'.

On the papers filed the applicant has *prima facie* established a liquidated claim entitling her to apply for the sequestration of respondent's estate and

that respondent's letter to her constitutes an act of insolvency in terms of s 8(*g*) of the Insolvency Act 24 of 1936. The first two requirements for the grant of a provisional order are therefore met. It is the third requirement, whether on the facts set out above there is reason to believe that it will be to the advantage of creditors if respondent's estate is sequestrated, that has occasioned me considerable difficulty in this matter.

I respectfully agree with the following observation of Roper J in *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558:

> 'The phrase "reason to believe", used as it is in both these sections (ss 10 and 12 of the Insolvency Act) indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be "satisfied", it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.'

The correct test to be applied is whether the facts placed before the Court show that there is a reasonable prospect—not necessarily a likelihood, but a prospect which is not too remote—that some not negligible pecuniary benefit will result to creditors. See *Meskin & Co v Friedman* (*supra* at 559); *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D) at 592G, 593C; *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1069G–1070A.

In the present case the pertinent facts are the following:

(i) It is clear that the respondent is not possessed of any assets whatsoever.

(ii) His salary of approximately R900 per month is insufficient to meet the current needs of his family, since he is being partially supported by his wife's family. Furthermore, he is at present unable from his monthly income to meet any commitments to creditors and faces applications for committal to prison, for failure to satisfy judgments in the magistrate's court, in proceedings under s 65A(1) of the Magistrates' Courts Act. There is accordingly no reasonable prospect that respondent would be able, even if freed from such commitments by a sequestration order, to contribute anything from his earnings for the benefit of the creditors. Cf *Ressel v Levin* 1964 (1) SA 128 (C) where it was recognised that receipt of a substantial salary may justify the conclusion that there is a prospect of a surplus being available for creditors, if the necessary information is placed before the Court.

(iii) There is no suggestion here that respondent has engaged in transactions which require investigation and may result in the discovery of assets which could be recovered for the benefit of the creditors. Had there been such a prospect there may well have been reason to believe that sequestration would redound to the benefit of the creditors. In such a case the Court will usually find that there is such reason to believe. See, eg, *Meskin & Co v Friedman* (*supra* at 559); *London Estates* case *supra* at 593E–594B; *LTR Beleggings (Edms) Bpk v Hechter (Mynhardt Toetredend)* 1977 (1) SA 22 (NC)

at 24E–G. There must, however, be a proper factual foundation laid in the application. See *Mamacos v Davids* 1976 (1) SA 19 (C) at 21H–22A.

(iv) The only funds which would become available for distribution amongst creditors is the paltry sum of about R1 000 from the amount of R2 500 which respondent's father-in-law is prepared to make available to creditors in the event of respondent's estate being placed under sequestration. If one excludes applicant's claim of R6 000, there are creditors amounting to R40 000, one of whom, the Trust Bank, has some security for its claim in the form of a cession of the debtors of Robot Furnishers. If, however, regard is had to the fact that the Receiver of Revenue is a creditor in respect of general sales tax and income tax for the amounts of R7 428 and R5 467 respectively, it would seem that concurrent creditors will not receive any benefit at all. In terms of s 99(1)(*c*C) of the Act any balance of the free residue remaining after defraying the costs of sequestration shall be applied in defraying the amount of any sales tax which was due by the insolvent immediately prior to sequestration. It follows that the Receiver of Revenue would 'scoop the pool', to use an apt colloquialism.

The preference created by s 101(*a*) in regard to pre-sequestration income tax would not come into play, though if it did it would similarly exclude any benefit for concurrent creditors. The sequestration of respondent consequently holds naught for the comfort of the concurrent creditors. Indeed, sequestration will not on the aforegoing analysis benefit the general body of creditors taken as a whole.

As mentioned above, this is a 'friendly sequestration'. While such sequestrations will not preclude the grant of a provisional sequestration order when the requirements of s 10(*a*), (*b*) and (*c*) are genuinely satisfied (*Jhatam and Others v Jhatam* 1958 (4) SA 36 (N) at 39H–40B), the Court should scrutinise such applications with particular care in order to protect the interests of creditors (*Klemrock (Pty) Ltd v De Klerk and Another* 1973 (3) SA 925 (W) at 926E, 927A–B). While one has sympathy for the plight of respondent in the present case, there is little doubt that the application has been brought primarily for his relief in order to avoid his having to face committal proceedings in the magistrate's court, the interests of creditors being of secondary importance. This is not the object of the Insolvency Act, nor was it ever intended that the compulsory sequestration procedure thereunder should be used for the purpose of aiding or shielding harassed debtors. As pointed out by Nicholas J (as he then was) in the *Klemrock* case *supra* at 926G–927A, the more appropriate procedure for a debtor in respondent's position is the voluntary surrender of his estate. See also *Wepener v Ericson* 1926 WLD 81 at 85.

In such a case the Court must still be satisfied in terms of s 6(1) of the Insolvency Act that it will be to the advantage of creditors if the debtor's estate is sequestrated. An application for voluntary surrender, however, is preceded by publication of a notice of surrender and delivery thereof to creditors, as well as the lodging of a statement of affairs which must be verified by affidavit and is open to inspection by creditors (s 4 of the Act).

In my view the Court should not readily encourage the avoidance of these statutory safeguards for creditors by sanctioning recourse to a friendly sequestration via the easy route of s 8(*g*) of the Act, unless it is clear that the general body of creditors will benefit. It would be as well to reiterate the pertinent caution sounded by Holmes J (as he then was) nearly 30 years ago in *R v Meer and Others* 1957 (3) SA 614 (N) at 619A–B, which remains entirely apposite today and which I respectfully adopt:

> 'I have stressed before that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors. *Marshall Industrials v Pillay and Another* 1956 (4) SA 580 (N). In my opinion the sequestration proceedings in this case were an abuse of the process of Court; and I regret to say that I do not think that it is an isolated instance. I think the Court could guard against such abuse in two ways: firstly, by paying more regard to the element of advantage to creditors in the petition, especially in cases which savour of friendly sequestration under s 8(*g*); secondly, by refusing to grant repeated adjournments of the rule *nisi* unless satisfied, on affidavit, that such would be to the advantage of creditors.'

See also Smith *The Law of Insolvency* 2nd ed at 76.

Insofar as it is suggested in the papers that respondent will be committed to prison 'for the non-payment of his debts', this does not seem to me to be an accurate statement of the position. In terms of s 65A(1) of the Magistrates' Courts Act, a judgment creditor in respect of a judgment debt or order for the payment of money in instalments, which remains unsatisfied for a period of ten days, may issue a notice calling upon the judgment debtor to appear before the magistrate's court to show cause why he should not be committed for contempt of court and why he should not be ordered to pay the judgment debt in instalments or otherwise. On the return day of this notice, s 65D requires the court in chambers to determine the judgment debtor's financial position, his ability to pay the judgment debt and his failure to do so and empowers the court to hear evidence in this regard. In determining the ability of the judgment debtor to satisfy the judgment the court is enjoined under s 65D(4)(*a*) to have regard, in the case of a natural person, to the nature of his income, the amounts needed for the necessary expenses of him and his family and for the making of periodical payments which he is already obliged to make in terms of an order of court, agreement or otherwise in respect of his other commitments as disclosed to the court. It is true that, in terms of s 65F(1), the magistrate's court has a discretion to grant an order for the committal of the judgment debtor for contempt of court for a period of up to 90 days, or in lieu thereof periodical imprisonment for a period not exceeding 2 160 hours, for failing to satisfy the judgment and to authorise the issue of a warrant for his arrest and detention in a specified prison.

However, s 65F(3), insofar as relevant, provides:

> 'No order shall be granted and no sentence shall be imposed and no warrant shall be authorized in terms of ss (1) of this section if the judgment debtor . . . proves to the satisfaction of the court—
> (*a*) . . .
> (*b*) . . .
> (*c*) that he has no means of satisfying the judgment debt and costs either wholly or in part and that such lack of means is not due to the fact that the judgment debtor—

(i) has wilfully disposed of his goods in order to defeat or delay payment of the judgment debt and costs; or

(ii) although he is able to earn sufficient to satisfy the judgment debt and costs in instalments or otherwise to pay such debts and costs, wilfully refuses to do so in order to evade or delay payment of the judgment debt and costs; or

(iii) is squandering his money or is apparently living beyond his means; or

(iv) incurred debts other than for household requirements after the judgment date.'

It is clear from this provision that a judgment debtor who can show that he is *bona fide* unable to pay the debt through lack of means is immune from imprisonment for contempt. The statute therefore does not provide for civil imprisonment of a debtor for a failure to pay his debts *per se*. Committal to prison is only sanctioned in the event of the debtor's wilful refusal to obey the court's order and as a penalty for his contempt of court. The Abolition of Civil Imprisonment Act 2 of 1977 abolished the civil imprisonment of debtors for failure to pay their debts. See Jones and Buckle *The Civil Practice of the Magistrates' Courts in SA* 7th ed at 227; cf *Quentin's v Komane* 1983 (2) SA 775 (T) at 777–8.

I am therefore unable to accept the argument that, if respondent is not sequestrated, he will inevitably be imprisoned. If he shows that he is genuinely unable to meet his commitments to judgment creditors, he cannot be committed for contempt. But, in any event, in the circumstances of this case I am not persuaded that the risk of respondent's incarceration for contempt of court at the instance of certain creditors is a relevant consideration or one which indicates that his sequestration would benefit his creditors.

There is accordingly, in my opinion, on the facts placed before me, no reason to believe that it will be to the advantage of respondent's creditors if his estate is sequestrated as required by s 10(*c*) of the Insolvency Act. In the result, the application for sequestration must be refused.

I may add that in any event the Court has a discretion in terms of s 10 whether or not to grant a provisional order of sequestration. See Joubert (ed) *The Law of South Africa* vol 11 *sv* 'Insolvency' para 186. Even if I were able to treat the surplus of approximately R1 000 from the amount which respondent's father-in-law is prepared to contribute in order to secure respondent's sequestration as holding the prospect of a pecuniary benefit for creditors, I would nevertheless still exercise my discretion against the grant of a provisional order.

Inasmuch as the primary, if not the sole purpose of the 'friendly' application is to come to the relief of respondent *vis-à-vis* his creditors and not to advance their interests, I am of the view that it should in any event not be granted. Further, for the reasons mentioned earlier, concurrent creditors will receive no benefit at all from the proposed arrangement whereby a mere R1 000 would be released from the contribution to be made by respondent's father-in-law. Respondent has no assets whatsoever and there is no realistic prospect that any surplus will become available from his salary for distribution to creditors. These are additional reasons for the exercise of discretion against the grant of a provisional order. Cf

Wepener v Ericson 1926 WLD 81 in which the Court refused a final order where the only effect of sequestration would have been to give the debtor relief against his creditors.

It seems to me that in a friendly sequestration a Court should be slow to countenance an offer of an insubstantial financial contribution which is to emanate from a family member as the 'price' for the grant of a sequestration order.

It is open to serious doubt whether such a procedure is consistent with the underlying principles of the Insolvency Act and the role assigned to the Court by that statute. It is tantamount to confronting the Court with a not very wholesome 'carrot' to induce it to grant relief where it cannot and would not otherwise do so. Such cajolery is, in my view, inappropriate and should be resisted.

The application for a provisional order of sequestration is accordingly refused.

Applicant's Attorneys: *Watkin & Kaplan*.

EDITORIAL NOTE

KRITZINGER v KRITZINGER 1987 (4) SA 85 (C)

The footnote to the report on this case appearing on page 85 of the October 1987 issue of the SOUTH AFRICAN LAW REPORTS indicating that the appeal which had been noted was not proceeded with is incorrect. The appeal is in fact being proceeded with in the Appellate Division.

The Editors and Publishers apologise for any inconvenience caused by the publication of such incorrect information.

The Editors.