REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/23121

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…… ……
SIGNATURE **DATE**

In the matter between:

RODEL FINANCIAL SERVICES PROPRIETARY LIMITED **Applicant**

and

URSULA MADALEEN O'CALLAGHAN **Respondent**

JUDGEMENT

Windell J:

INTRODUCTION

[1] This is an opposed application for a provisional order sequestrating the respondent's estate.

[2] In terms of section 10 of the Insolvency Act, 24 of 1936, ("the Act") the requirements for a provisional sequestration are *prima facie* proof that the applicant has a claim in terms of section 9(1); the debtor is insolvent or has committed an act of insolvency (section 8); and advantage to creditors (section 10 (c)).

[3] The respondent does not dispute that the applicant has a claim in terms of section 9(1) of the Act. The only issues therefore to be determined are whether the debtor is insolvent/ has committed an act of insolvency, and if the sequestration will be to the advantage of creditors.

ACT OF INSOLVENCY: SECTION 8

[4] The onus is on the applicant to prove that the respondent has committed an act of insolvency. The applicant relied on the following documents as proof that the respondent committed an act of insolvency:

- *Nulla bona* return – section 8(b);
- Settlement agreement – section 8(e) and section 8(g)

The nulla bona return

[5] Section 8(b) of the Act reads as follows:

> "*A debtor commits an act of insolvency – if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment".*

[6] In terms of section 8(b) of the Act, two separate and independent acts of insolvency are created. The first, occurs where the debtor is served with a writ by the execution officer and the debtor fails to satisfy the judgment debt or to indicate disposable property, sufficient for that purpose. The second is where the execution officer is unable to serve the writ upon the debtor personally and the execution officer is unable to find sufficient disposable property to satisfy the judgment[1].

[7] The respondent challenges the returns of service relied upon by the applicant to prove an act of insolvency *firstly*, on the basis that the return of service, on the face of it, does not prove an act of insolvency, and *secondly* that the return of service is stale.

[8] Both the returns clearly indicate that the respondent was absent and that no demand was made on her. Under these circumstances the return must therefore unambiguous and clearly show that the respondent did not have sufficient disposable assets from which the debt could be satisfied. See *Corner Shop (Pty) Ltd v Moodley*[2] and *Logie v Priest*[3].

[10] In the return dated 21 August 2015, the sheriff stated the following:

> "*On this 21st day of August 2015 at 09:40 I attempted to execute this WARRANT OF EXECUTION AGAINST MOVEABLE PROPERTY at […] BREDELL, KEMPTON PARK. All the assets on the premises*

[1] See Meskin, page 2-6(7)
[2] 1950 (4) SA 55 (T)
[3]

Belongs to Marchelle Country Estate as confirmed by Mr E Stols, Owner. Mrs O' Callaghan, 2nd Respondent is staying on the premises and I could not Locate sufficient property to satisfy the judgment.

This is an amended return".

[11] In *Kader v Haliman*[4], the court per Milne J held the following[5]:

In my view generally speaking a messenger's return to a warrant which is unsatisfied and in respect of which no attachment has been possible (commonly called a nulla bona return) should state, inter alia:

(a) that he explained the nature and exigency of the warrant, and The person to whom he explained it;

(b) that he demanded payment;

(c) that the defendant failed to satisfy the judgment;

(d) that the defendant failed, upon being asked to do so, to indicate disposable property sufficient to satisfy it. (The expression "disposable property" is preferable to the words "goods", for the former include immoveable property. Per Broome, J. (as he then was), in Horace Sudar & Co. (Pty.) Ltd v Cassja & Co and Others, 1950 (1) S.A. 203 (N) at p. 206);

(e) that the messenger has not found sufficient disposable property to satisfy the judgment, despite diligent search and enquiry.

[12] The return of service only relates to movable property. The sheriff made enquiries from Mr Stols, who confirmed that all the assets on the premises belong to

[4] 1958 (4) SA 31 (N)
[5] At page 32 E-H

Marchelle Country Estate. The return does not indicate what steps the sheriff took or what enquiries he made to establish that there is not sufficient property to satisfy the judgment. The respondent further state that if the sheriff conducted a diligent search, he would have ascertained that she owns a half-share in the immoveable property and that the property is unencumbered.

[13] The returns must show that the requirements of section 8(b) have been complied with. In view of the important consequences that may flow from a debtor's failure to satisfy writ, It behoves all execution officers to pay special regard to the provisions of the Insolvency statute when making out their returns to writs" and The return should state the facts of the matter as found by the messenger and routine forms should be used with caution".

Stale service

[14] The second aspect impacting on the return of service relates to stale service. It is common cause that at the time of the launching of this application, the return of service was 12 months old, and at the time of hearing the application it was 19 months old.

[15] In *Abel v Strauss*[6], the return of service relied upon was 7 months old. The court, relying on the matter of Bhyat v Khubishi TPD 896, held that there must be allegations supported by facts that the debtor's position remains unchanged.

[6] 1973 (2) SA 611 (W)

[16] This principle was reaffirmed in the matter of *Nodrew (Pty) Ltd v Rossouw*[7]. In this matter, Steyn J found that he was unable to rely on the return of service as proof of an act of insolvency where it was 18 months old and in the absence of any allegations that the debtor's position remains unchanged.

[17] It is clear that the return of service the applicant relies upon is stale. No allegations was made in the applicant's papers that the respondent's position remained unchanged. I am not satisfied that the returns comply with section 8 (b). The applicant has, therefore, failed to prove that the respondent committed any act of insolvency in terms of section 8(b) of the Act.

The settlement agreement

[18] The respondent entered into a settlement agreement with the applicant on 31 March 2014. The applicant submitted that the respondent has also committed acts of insolvency in terms of section 8(g), by concluding the settlement agreement, which is a notice in writing to a creditor of an inability to pay her debts and in terms of section 8(e), by concluding the settlement agreement, which is an offer made to a creditor for the release in part from her debts.

[19) In Meskin,[8] the author, with reference to the matter in *Laeveldse Koöperasie Bpk v Joubert* [9]*,* states as follows:

> "*The making of an offer by the debtor to his creditors which entails their releasing him wholly or partially from his debts is an act of insolvency provided it involved, expressly or impliedly, an acknowledgment by the debtor*

[7] 1975 (3) SA 137 (0)
[8] "Insolvency Law" at page 2-14(2)
[9] 1980 (3) SA 1117 (T) at 1126A

that he is unable to pay such debts in full. Thus an offer to compromise a disputed debt by way of payment of portion thereof and the alleged creditor's waiving the balance, is not this act of insolvency and it is submitted that the making of an arrangement, ie, agreement, in terms of which the debtor is released wholly or partially from debt or debts, is not an act of insolvency, within the meaning of section 8(e), unless one is able to establish that, independently of such arrangement , the debtor was unable to pay such debt debts. The Legislature cannot have intended there to be a commission of this act of insolvency where, eg, a debtor enters into an agreement with a particular creditor in terms of which such creditor accepts part payment in return only for anticipation of the due date of payment but the debtor otherwise is able to pay all his debts in full."

[20] The respondent contended that the settlement agreement is not indicative of the respondent's inability to pay her debts. I agree, it may not comply with the requirements of section 8(e), but the applicant also relies on section 8(g) that states that a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.

[21] In the settlement agreement the respondent stated in clause 4 that she *"acknowledges that she is unable to repay the Judgment Debt as it has fallen due".* Meskin states that whether the notice referred to in section 8 (g) is such as to constitute an act of insolvency, depends on an interpretation of its content. The question is how a reasonable man of business receiving the notice would understand it.

[25] The statement made by the respondent in the settlement agreement is clear. She is unable to pay her debt. I am satisfied that her acknowledgment that she is unable to repay the judgment debt as it has fallen due is an act of insolvency as provided for in section 8(g) or the Act.

Actual insolvency

[26] It is trite that in the exercise of the court's discretion in respect of the granting of a sequestration order, the court may refuse to sequestrate where, in light of the evidence adduced by the debtor in opposition to the application, the court is satisfied that, notwithstanding the act of insolvency, the debtor is in fact solvent.

[27] Actual insolvency denotes that the debtor's liabilities actually exceed the value of his assets. The applicant contended that the respondent admitted she was insolvent by producing a statement of assets and liabilities on 16 March 2016 which represented her liabilities to excess the value of her assets by the sum of R275 000.00.

[29] The respondent contends that the statement of assets and liabilities is not a true reflection of her financial position; that she was conservative with the valuation of her assets at the time of completing the statement, and that her circumstances have changed since completing the statement. The respondent submitted that she has put up her clear evidence that her assets far exceed her liabilities and that she has sufficient disposable property to satisfy the judgment.

[30] The respondent deals with this issue in a lengthy answering affidavit wherein she explains the circumstances under which the judgment debt was incurred. She stated that she was a member of Elmount Court CC together with Terence John Rossiter ("Rossiter"). Elmount Court CC is the owner of a block of flats, which it sold to a third party. Elmount Court CC required bridging finance from the applicant in order to make payment of the outstanding municipal accounts. The applicant provided Elmount Court CC with a loan of R974 738.69. As a result, she and Rossiter bound themselves as sureties for the loan to Elmount Court CC. However, due to an eight-month delay in obtaining clearance figures from the City of Johannesburg, the purchaser cancelled the sale agreement. Thus, the proceeds of sale, which were to be used to pay the applicant, did not materialize. As a result, the applicant instituted action against Elmount Court CC, Rossiter and the respondent for the loan amount together with the discounting fee and interest. On 7 September 2011, the applicant obtained an order for payment and commenced to apply for the liquidation of Elmount Court CC. Elmount Court CC is currently in provisional liquidation. She contends that Elmount Court CC has sufficient assets to discharge the judgment debt and there is no need for a sequestration order. The property owned by Elmount Court CC has nine flats and four storerooms and is fully let. The municipal valuation for this property is approximately R3 680 000.00. The respondent continues that even if this property sold at half of its value at auction and less the amount owing to the City of Johannesburg, this would be sufficient to satisfy the judgment amount as well as the trustee's fees. The monthly rental collection from the flats and storerooms amounts to approximately R34 981.92. She avers that an amount of R698 000.00 has been paid toward the judgment debt and the applicant

has frozen her personal banking account and there is currently an amount of about R50 000.00 in the banking account.

[31] The respondent also deals with her current financial position in the answering affidavit. She avers that she is not insolvent and that her assets exceed her liabilities. She submitted that the applicant has not produced or even attempted to produce any admissible evidence, which established the fair value of her assets, nor her liabilities and that the statement of assets and liabilities relied upon by the applicant is not a true reflection of her financial position. She states that she was too conservative at the time of the completion of the statement.

[32] The respondent contends that she is the sole member of Universal Dent Removal trading as Extreme Dent and that she receives an income of R196 000.00 per annum. She is also the half owner of Erf 185, Bredell Agricultural Holdings situated at 185 High Road, Bredell, Kempton Park. The other half of this immovable property is currently registered in the deceased estate of her late husband. The property is unencumbered. The applicant has attached a Windeed Property Report and terms of the report, the extent of the immovable property is 17 373 square meters. The average selling price in the area is R274 per square meter and the average selling price of the immoveable property would be approximately R4 760 202.00. Her half share of the immoveable property would be R2 380 101.00. She therefore contends that the value of her half share of the immoveable property alone is sufficient disposable property to satisfy the judgment. She is also the owner of a restaurant on the immoveable property, the Windpomp Kombuis, which operates from the immoveable property since March 2016. The restaurant has a monthly

turnover of R55 000.00 and after expenses, there is a net amount of R20 000.00 per month (R240 000.00 per annum). The respondent states that she also omitted to mention in the statement of assets and liabilities, that she is the sole member of Universal Dent Removal trading as Extreme Dent from which she earned R192 000.00 per annum. She submits that she is able to realize by private sale an amount that far exceeds the judgment amount on her share of the immoveable property. On the applicant's valuation of the immoveable property, there can be no reason to sequestrate her.

Conclusion

[33] The applicant relies on a statement of assets and liabilities dated 2 March 2016. The applicant must adduce evidence of the debtor's liabilities and of the market value of her assets on the date of the application. There is clearly a dispute as far as the basis for actual insolvency is concerned. The respondent has shown that her position has drastically changed since she entered into the settlement agreement. I am not satisfied that the applicant has proven, on a balance of probabilities, that the respondent is actually insolvent.

[34] Where an applicant for the sequestration of a debtor's estate relies on an act of insolvency committed by the debtor, as well as actual insolvency, proof of the alleged acts of insolvency will suffice even where there is a dispute as the grounds alleged as the basis for actual insolvency. In *Metje & Ziegler Ltd v Carstens*[10], Hall JP stated that the commission of an act of insolvency by a debtor is the most important factor in a decision as to whether his estate should be sequestrated or not,

[10] 1959 (4) SA 434 (SWA) at 435A

and that it places the applicant for a debtor's sequestration in a much stronger position than a mere general allegation of insolvency does. The learned judge further held that if the respondent in sequestration proceedings can show on the balance of probabilities that it is not for the benefit of creditors to sequestrate him because he is actually solvent, and he can give some reasonable explanation as to how it came about that he committed the act of insolvency and is thus able to exonerate himself for committing it, then the Court may well exercise its discretion in his favour.

[25] The respondent explained the circumstances under which she entered into the settlement agreement. I am of the view that the only question left for determination is whether the applicant had provided sufficient evidence to show that there is reason to believe that it will be to the advantage of creditors of the debtor if her estate is sequestrated.

ADVANTAGE TO CREDITORS

[26] Section 12 (1)(c) of the Act provides that when a final sequestration order is sought, a court must be satisfied that there is:

> *"…reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated."*

[27] The applicant submitted that the respondent did not dispute that the sequestration of her estate will be to the advantage of her creditors. The applicant relies on paragraph 74.2 in the answering affidavit wherein the respondents contends that: "*The consideration of advantage to my creditors should not feature as*

the applicant has not made out argument that I am factually insolvent or that I committed an act of insolvency."

[28] It is, however, the applicant that bears the onus of establishing *prima facie* that there is reason to believe that sequestration will be to the advantage of creditors. The applicant submits that it discharged the onus of proving that the sequestration of the respondent's estate would be to the benefit of her creditors. The applicant submitted that the disposal of the respondent's half share in the immoveable property and her members interest in the Universal Dent Removal CC will yield a not negligible dividend to creditors. A proper investigation into her affairs and her interests in various other entities may yield further dividends.

[29] From the information made available to this court, the applicant is the only creditor of the respondent. The court must be furnished with sufficient facts to come to the "rational or reasonable belief" that sequestration will be to the advantage of creditors.[11] A court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. This requirement will be met if there is reason to believe, not necessarily a likelihood, but a prospect not too remote, that as a result of investigation and inquiry, assets might be unearthed that will benefit creditors.

[30] Counsel for respondent contended that the founding papers did not set out sufficient facts to show that the sequestration of the respondent's estate will be to the advantage of her creditors.

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[11] See *Hillhouse v Stott; Feban Investmants (Pty) ltd v Itzkin; Botha v Botha 1990 (4) SA 580 (W)*

[31] An advantage to creditors need not be a specific dividend in the Rand calculated on the assets and liabilities of the debtor. In *Stratford and Others v Investec Bank Ltd and Others*[12], the court held[13]:

> "*The meaning of the term advantage is broad and should not re rigidified. This Includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful. Meskin et al state –*
>
> > "*the relevant reason to believe exists where, after making allowance for the anticipated cost of sequestration, there is a reasonable prospect of actual payment being made to each creditor who proves a claim, however, small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum on of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate with extensive liabilities may be rendered immune from sequestration due to an inability to demonstrate that a not-negligible dividend may result from the grant of an order".*
>
> *The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to the court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which creditors cannot get payment, except through sequestration, or that*

[12] 2015 (3) SA 1 (CC)
[13] At paragraph 44 to 45

some pecuniary benefit will redound to the creditors."

[32] In determining the reasonableness of the prospects of there being a benefit to creditors in sequestration, it is proper to have regard to the significance itself of the very fact of the administration of insolvency. See *Chenille Industries v Vorster*[14], where Horwitz J observed the following:

"[*There are]…the superior legal machinery which creditors aquire by sequestration, the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds."*

[33] In *Amod v Khan*[15], the applicant was the first respondent's sole creditor. The court observed that the proceedings therefore lacked resemblance to the typical sort, in which the debtor has a variety of creditors, but insufficient assets to meet all their competing claims, and sequestration seems likely to benefit them as a group by ending the danger that some may be preferred to others and ensuring instead that the proceeds are shared fairly. The court held that there was no reason principle why a debtor with only one creditor should not have its estate sequestrated, but the potential advantages of sequestration in that situation are inherently fewer, and the case for it is correspondingly weaker. Then it is really no more than an elaborate means of execution and because of it costs an expensive one.

[14] 1953 (2) SA 691 (0) at 699F-H
[15] 1947 (2) SA 432 (N)

[33] In deciding whether there is reason to believe that sequestration will be to creditors' advantage the court must have regard to any other suggested method of regulating the debtor's affairs, eg, through an administration order in terms of the Magistrates' Court Act 32 of 1944, and should undertake the relevant comparison. Didcott J stated in *Gardee v Dhanmanta Holdings and Others*:

> *"The notion of advantage to creditors is a relative and not absolute one. Sequestration cannot be said to be to the creditors' advantage unless it suits them better than any other feasible and reasonably available alternative course."*

[34] In a case where the applicant is a judgment creditor who had not proceeded to execution in the ordinary course, it is necessary for him to demonstrate a reasonable expectation that the anticipated payment to him will exceed the likely proceeds of such execution. Where execution is cheaper and more expeditious than sequestration and the sole creditor already has a judgment, generally there is no reason to believe that the sequestration will be of advantage to creditors. However, where the applicant has no judgment, the circumstances may show that the machinery of the Insolvency Act is quicker and cheaper than to issue summons and proceed to judgment and execution; where the debtor is hopelessly insolvent and will not be able to meet the judgment, sequestration may be more advantageous to creditors than the trial procedure.

CONCLUSION

[25] In an opposed application for a provisional order of sequestration the necessary *prima facie* case is established only when the applicant can show that on a

consideration of all the affidavits filed, a case for sequestration has been established on a balance of probability. Even if all the requirements of section 10 had been complied with, a court still retains a discretion whether to grant a provisional order of sequestration or not.

[26] Despite the fact that the applicant has a claim as mentioned in sectioned 9(1), and despite the fact that the respondent has committed an act of insolvency, I have no reason to believe that sequestration will be to the creditor's advantage.

[27] In the exercise of my discretion, the application to sequestrate the estate of the respondent is refused.

[28] In the result the following order is made:

1. The application is dismissed with costs.

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L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Attorney for applicant:	Edward Nathan Sonnenbergs Inc
Counsel for applicant:	Adv. R.M. van Rooyen
Attorney for respondent:	Mohammed Randera & Associates

Counsel for respondent:	Adv. L. Hollander
Date of hearing:	15 March 2017
Date of judgement:	31 March 2017