

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



Case number: 20/21345

Date of hearing: 23 November 2022

Date delivered: 19 December 2022

DELETE WHICHEVER IS NOT APPLICABLE

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

19 December 2022

DATE

SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

WYCLIFFE ERNEST THIPE MOTHULOE Respondent

JUDGMENT

KEMACK AJ:

1. The applicant applies for the final sequestration of the respondent's estate, a provisional sequestration order having been granted on 10 November 2021.
2. Section 12 of the Insolvency Act 24 of 1936 sets out the requirements for a final sequestration order. The court may grant such an order if it is satisfied that the petitioning creditor has established a liquidated claim of at least R100 against the debtor; that the debtor has committed an act of insolvency or is factually insolvent; and that there is reason to believe that it will be to the advantage of creditors of the debtor if the debtor's estate is sequestrated. For a final order, these three elements must be established on a balance of probabilities.
3. The applicant relies on two unsatisfied judgments for its liquidated claims: the first for R6,358,107.32 granted on 16 August 2016 under Gauteng Division, Pretoria case number 42519/2016 ("the first judgment", annexure "FA2" to the founding affidavit); and the second for R1,528,881.08 granted on 21 February 2018 under Gauteng Local Division, case number 2017/46489 ("the second judgement", annexure "FA9" to the founding affidavit).
4. In addition, the applicant relies on a liquidated claim in the amount of R4,479,476.26 under a loan agreement.
5. The first respondent's attempts to obtain leave to appeal the two judgments against him were unsuccessful, and those judgments are presently enforceable and unpaid. A

judgment debt is clearly a liquidated amount and the R7,886,988.40 total of the capital amounts in the two judgments is indisputable.

6. It follows that even without taking into account the third debt under the loan agreement, the applicant has satisfied the first requirement for a final winding up order on a balance of probabilities.
7. Section 9(1) of the Insolvency Act provides for sequestration of a debtor “*who has committed an act of insolvency, or is insolvent*”.
8. Section 8(b) of the Insolvency Act states that “*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.*”
9. Annexure “FA14” to the founding affidavit is a warrant for execution against movable property dated 2 March 2020, issued by the registrar of the High Court under the first judgment. Annexure “FA15” is a Sheriff’s return of service dated 25 March 2020, providing details of an attempt to execute the warrant at the respondent’s residence at 154 Senior Drive, Northcliff, Johannesburg, on 18 March 2020. The return of service includes a handwritten note signed by the respondent, stating “*Def informed that he has no assets to cover this writ therefore my return of service will be of a nulla bona return*”.

10. An act of insolvency is sufficient for sequestration without the need to prove actual or commercial insolvency, provided the respondent does not rebut the act of insolvency by producing admissible evidence that the respondent's assets actually exceed the respondent's liabilities.
11. The respondent neither denies this *nulla bona* return, nor discloses evidence of assets sufficient to rebut the presumption of insolvency created by it.
12. The two immovable properties which are the subjects of the first and second judgments, are bonded to the applicant. The Northcliff property to which the first judgment relates has a market value of R5,900,000 and a forced sale value of R3,875,000, while the market value of the Observatory property to which the second judgment refers is R985,000. At best for the respondent, the combined value of these immovable assets is substantially lower than his total capital indebtedness (excluding interest) to the applicant, which amounts to R12,366,464.70.
13. The respondent provides no evidence of other liquid assets. Rather, the respondent relies for solvency on claims which he alleges he has against the Premier of North West Province for R20 million; against a person named Neil David Rissik for R6,5 million; and against his estranged wife for R15 million.
14. These claims against third parties are baldly alleged without detail or substantiation, and the respondent does not do sufficient to satisfy the court that these contingent claims should have the status of assets in his estate for purposes of assessing solvency. In any event, until such time as those claims might be successfully

concluded and the amounts recovered, the respondent is commercially insolvent in the sense that he is presently unable to pay his debts.

15. The respondent alleges that his indebtedness to the applicant for the Northcliff house should be reduced by half because there has been a termination of the joint ownership of this property by him and his estranged wife. The respondent's logic appears to be that his wife's independent ownership of 50% of that property absolves the respondent of 50% of the indebtedness under the first judgment. It is not necessary to decide this issue, because even after a deduction of half the Northcliff indebtedness from the respondent's total capital indebtedness to the applicant, the unpaid difference exceeds his non-contingent assets.
16. It follows that the applicant has satisfied the second requirement for a final sequestration order, on a balance of probabilities.
17. Regarding benefit to creditors, the insolvent's version is that his tangible assets are the Observatory Property and half the value of the Northcliff property. The Observatory property was sold in execution for R985,000, and half the forced sale value of R3,875,000 for the Northcliff Property is R1,937,500. Their combined value is R2,929,506: applied to payment of the total of R12,366,464.70 for the first and second judgments and the loan indebtedness, the result is a potential dividend of 23 cents in the rand. Moreover, there will be additional benefit to creditors if a trustee in final sequestration uncovers further assets in the respondent's estate.
18. The court is accordingly satisfied that on a balance of probabilities, final winding up will result in benefit to creditors.

19. It remains to consider the defences raised by the respondent, which is done in the following paragraphs.

That the applicant failed to comply with sections 10 and 12 of the Insolvency Act, by seeking a sequestration order rather than a provisional sequestration order in the notice of motion

20. It is the practice in these courts to grant a provisional sequestration order pending an application for a final sequestration order, even though the notice of motion does not expressly request a provisional sequestration order.
21. In accordance with that practice, a provisional sequestration order was granted in this matter. This defence accordingly has no merit.

That the applicant failed to file a security certificate as required by section 9(3)(b) of the Insolvency Act

22. The applicant's certificate of tendered security is part of the record.
23. The respondent did not persist with this line of defence during the hearing. It is not a valid defence.

That the applicant's claims are not liquidated

24. Both the first and second judgments are incontestably for payment of liquid amounts. Since one liquidated claim exceeding R100 is sufficient for a sequestration order, this defence cannot succeed.

That a sequestration order will have equal and competing rights with the 20 November 2019 court order terminating joint ownership of the Northcliff property by the applicant and his wife

25. There is no dispute regarding the existence of the 20 November 2019 judgment.
26. That judgment, however, does not affect or prevent the sequestration of the respondent. The trustee of the insolvent estate will be required to determine what assets are owned wholly or partly by the applicant and wholly or partly by his estranged wife, and will deal with those assets or the applicable portions of those assets accordingly.

Non-joinder of the respondent's estranged wife

27. The respondent did not deliver heads of argument for this hearing. Rather, on 21 November 2022 the respondent produced a "notice to take a point of law" referring specifically to "non-joinder" of a necessary party. This refers to the respondent's wife, Dr Neo Brenda Mothuloe. To avoid confusion, this judgment refers to her as the respondent's wife.
28. The respondent's argument was that his wife should be joined as a necessary party to this application, not on account of how a final sequestration order might affect her rights, but on the basis that she has sufficient assets to settle the applicant's claims and thereby avoid the respondent's final sequestration.

29. This argument has no merit. The sequestration application is against the respondent alone and he has no entitlement to join his wife in the hope of inducing her to use her assets to pay the applicant.
30. In De Jager Investments (Pty) Ltd v Mark 1952 (3) SA 471 (W), the court decided that a spouse of a person defending a sequestration application has no direct and substantial interest in the application, and rejected a similar defence of non-joinder.
31. Section 21 of the Insolvency Act provides that the property of the spouse of a sequestrated person vests in the trustee as if it were the property of the sequestrated estate, subject to the spouse whose estate has not been sequestrated having the right to prove that such property is the property of that spouse alone. and should therefore be excluded from the sequestrated estate. In Harksen v Lane NO and Others 1998 (1) SA 300 (CC), the Constitutional Court considered and upheld the constitutionality of section 21, without considering or overruling the De Jager judgment.
32. In the Harksen judgment, the Constitutional Court did not deal with the issue of whether the De Jager judgment remains good law under the South African Constitution.
33. It is not necessary to consider that issue in this judgment, however, because the respondent himself served an application on his wife for her joinder as a party to this sequestration application, and on 17 October 2022 her attorneys delivered a notice of her intention to oppose the joinder application.

34. There can be no clearer indication that the respondent's wife is aware of this application, and has made a positive election to not be joined as a party to it. Accordingly, insofar as she has rights worthy of protection, the procedure under section 21 of the Insolvency Act will be available to her.
35. As the respondent's wife knows of and objects to being a party to this application, the non-joinder defence cannot succeed.
36. For these reasons the court orders as follows:
- 36.1. The respondent's estate is finally sequestrated;
- 36.2. The costs of the sequestration application are to be costs in the sequestration.

KEMACK AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT,

JOHANNESBURG

COUNSEL FOR APPLICANT: Adv L Acker

ATTORNEY FOR APPLICANT: Claassen Inc. Attorneys

COUNSEL FOR RESPONDENTS: Adv R. Maphutha

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