

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

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

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DATE
SIGNATURE

In the matter between:

JM BUSHA INVESTMENT GROUP (PTY) LTD

Applicant

And

BUSHIRI SHEPHERD HUXLEY

Respondent

JUDGMENT

MAKUME, J:

[1] This is an application for the final sequestration of the Respondent's estate. A *Rule Nisi* was issued following an ex parte application in the Urgent Court on the 20th November 2020.

BACKGROUND

[2] In order to contextualise the dispute it is necessary to provide a short chronology of salient events leading up to the proceedings of the 20th November 2020.

[3] The Respondent and his wife are well known in the Gauteng area and operated a church with a large following. On the 23rd March 2020 the Respondent consented to an order under case number 39782/2019 in this Court, in terms of which he together with his wife and a company called Shepherd Bushiri Investment Group (Pty) Ltd admitted being liable to the Applicant in the amount of R203 544 945.81 together with interest.

[4] It was a term of the order that the Respondent would settle his indebtedness to the Applicant in the following manner:

- i) That the Applicant could dispose of various immovable properties of the Respondent.
- ii) That the Applicant could perfect its pledge of various movable assets that were subject to the general Notarial Bonds.

[5] It was further ordered that execution of the order stated in (4) above be suspended on condition that the Respondents thereto jointly and severally paid:

- i) The arrear interest on or before 31 March 2020;
- ii) The sum of R100million on or before 20 April 2020;
- iii) The sum of R103 544 845.95 on or before 10 May 2020;
- iv) Costs of the application on the scale as between attorney and client.

[6] It is common cause that the Respondent nor any of the co-Respondents made any payment.

- [7] Having received no payment the Applicant's attorneys sent a letter of demand to the Respondent threatening attachment and execution in terms of the order.
- [8] On the 10th July 2020 the Respondent failed in an urgent application to prevent execution. Similarly, the second such application failed on the 6th August 2020.
- [9] In the meantime Respondent had launched an application to rescind the consent order granted on the 23rd March 2020 which rescission application was dismissed on the 11th November 2021.
- [10] During or about October 2020 the Respondent and his wife were arrested on charges of amongst others money laundering and fraud. They appeared in Court in Pretoria on the 4th November 2020 and were released on bail subject to stringent conditions.
- [11] On the 9th November 2020 Mr Joseph Makamba Busha a director of the Applicant telephoned the Respondent to make enquiries about non-payment. The Respondent told him that payment in full will be made on Monday the 16th November 2020.
- [12] On Friday the 13th November 2020 Respondent and his wife fled the country back to their country of origin Malawi. Their bail has been estreated. Application for their extradition back to South Africa is still pending. Pastor Bushiri and his wife as he is known has categorically indicated that he has no intention of returning to South Africa to face the charges.
- [13] The Applicant received no payment as promised on the 16th November 2020. The Applicant then approached Court on an urgent basis and was granted an order on the 20th November 2020 provisionally sequestrating the estate of the Respondent and appointed Mr Jeritanos Mashamba and Louisa Selina Kgatle as joint Trustees to the estate of the Respondent.

- [14] On the 4th November 2021 almost a year after the granting of the provisional order the Respondent who I shall henceforth refer to as Bushiri entered appearance to oppose the final granting of the order of sequestration and subsequently filed his answering affidavit on the merits as well as taking points in *limine* to the application.
- [15] On the 26th November 2021 Bushiri uploaded and filed his answering affidavit.
- [16] On the 01st March 2022 the Applicant filed heads of argument and then only on the 14th March 2022 filed their replying affidavit.
- [17] On the 14th March 2022 Bushiri filed a notice in terms of Rule 30(2) (b) stating that the Applicant's filing of their Replying affidavit after having filed heads of argument was an irregular step it having been filed four months out of time with no application to condone the late filing.
- [18] On the 5th April 2022 the Applicants filed their application for condonation for the late filing of their Replying affidavit. Mr Clifford Levin, Bushiri's Attorneys attested to an affidavit opposing the granting of condonation.
- [19] On the 14th April 2022 the joint trustees filed an interim report for the attention of the Court about the state of affairs of the Estate of Bushiri.
- [20] On the 20th April 2022 Bushiri filed an application seeking an order that the undated Trustees report be struck from the record and be regarded as pro-non scripto for purposes of the main application.
- [21] On the 3rd May 2022 Bushiri filed a power of attorney nominating and appointing Mr Clifford Brian Levin as his attorney in the matter. This was in response to a Rule 7 notice that the Applicant had filed.
- [22] There was accordingly before me on the 4th May 2022 besides the main application the following interlocutories:

- i) The application to strike the undated report by the Trustees.
- ii) The Irregular step application in terms of Rule 30 (2) (b).
- iii) The condonation application to condone the late filing of the Applicant's replying affidavit.

[23] Over and above this I also had to simultaneously deal with the following points in *limine* raised by Bushiri they are as follows:

- i) Lack of jurisdiction Bushiri maintains that this Court has no jurisdiction to hear this matter "as the Respondents do not reside within the geographical area over which this Court exercises jurisdiction."
- ii) Non-compliance with the provisions of the Matrimonial Property Act. Bushiri maintains that since he and his wife are married in Community of Property his wife should have been joined in the application as prescribed by Section 17(4) (b) of the Matrimonial Property Act.

THE STRIKING APPLICATION

[24] I propose to deal first with the interlocutory application. The striking off application was filed on the 28th April 2022 some four days before the hearing of the main application. The affidavit is deposed to by Mr Clifford Brian Levin Bushiri's attorneys of record. The Trustees had only one day to answer to the voluminous affidavit filed by Mr Levine.

[25] The affidavit by Mr Levin is largely hearsay and the averments therein have not been confirmed by Bushiri who must have also seen it.

[26] One blatant and scandalous statement made is that Bushiri only came to know about the sequestration one year after the provisional order had been

granted. This is obviously not true because in a letter addressed to the Trustees attorneys by Mathopo Attorneys who acted for Bushiri dated the 12th January 2021 it was stated as follows:

“We discussed the contents of your letter with Mr SH Bushiri. Our client had no knowledge of the legal proceedings instituted against him which resulted in the provisional sequestration order of his estate on 24th November 2020.”

- [27] During argument Counsel for Bushiri could not proffer a response to this contradiction.
- [28] The issues in this matter is not so much what the report contains it is firstly whether there is a valid objection to it being filed by the Trustees.
- [29] In *Salzmann v Holmes* 1914 AD 152 and *Stephens v De Wet* 1920 AD it was held that when an objection goes to the root of the entire claim or defence the proper procedure is exception whereas a motion to strike is usually appropriate when portion of a claim or defence is objected to. The Court does however have inherent jurisdiction to strike out a whole claim which is frivolous, improper or was instituted without sufficient grounds.
- [30] The application to strike out by Bushiri is not directed at a particular portion, what Bushiri ask is that this Court treats the report as being pro-non scripto. This is strictly speaking not an application to strike a pleading as the Trustees report is not a pleading and it has not been incorporated by the Applicant as such into its pleadings. The Application by Bushiri can best be described as an application to not consider the report in this application.
- [31] It is trite law that the function of a provisional trustee is essentially to take physical control and to superintend administration of the property and affairs of the estate pending the appointment of trustees. It is accordingly only fair competent and in the interest of justice and protection of creditors that provisional trustees place before a Court on the return day of the order evidence concerning the result of his investigation of the Respondent affairs

subject to affording Respondent an opportunity to answer such. (See **Smith and Walton (SA) (Pty) Ltd v Holt 1961 (4) SA 157 D at 16**; **Van Aswegen vs Pienaar 1967 (1) SA 571 (O) at 572 – 573**; **Shepherd v Mitchell Cott Seafright (SA) (Pty) Ltd 1984 (3) SA 202 (T) at page 206**.)

[32] The Court in Smith (supra) expressed itself as follows at page 161 H – 162 A:

“Mr Meskin submitted that the provisional trustee was not under any duty to report to the Court on any investigation which he might have undertaken after the grant of the order provisionally sequestrating the estate in question, and that his report in the form of an affidavit filed by the Applicant in these proceedings should therefore be struck out. In my opinion however, if a provisional trustee obtained information which has a bearing upon the various matters arising for determination on the return day there can be no objection to that information being placed before the Court in proper form merely because he is not under any statutory duty to carry out an investigation in connection with those matters and to report thereon to the Court.”

[33] In this matter the Trustees have placed before this Court vital information regarding the refusal by Bushiri to comply with statutory requirements. His attorney Mr Levin has in fact confirmed that Bushiri is not prepared to comply and complete a statement of his financial affairs. This attitude by Bushiri can only be described as being contemptuous of a Court order.

[34] The application to strike is in my view misguided. The aim of Bushiri is to keep out damning information from the Court. He has put before this Court a version which is transparently false.

[35] In the result the application to strike is dismissed with costs. I am not inclined to grant a punitive costs order against Mr Levin he is only carrying out instruction. The costs shall be costs in the sequestration on an attorney and client scale.

THE IRREGULAR STEP AND CONDONATION APPLICATION

- [36] It is common cause that the Applicant filed its Replying Affidavit some four months after the filing of the Answering Affidavit. It is also correct that at the time of such filing the Applicant did not file an application for condonation. It did so on the 5th April 2022 being the same day on which the Respondent Bushiri filed his notice to declare the Replying Affidavit an irregular step in the proceedings and that same be struck from the record.
- [37] Mr Rowan Jaraad Furman in his affidavit in support of the Condonation application informed the Court that during October 2021 he was involved in a serious aircraft accident and spent time in hospital from 30 October 2021 until 31st December 2021. He advised that on the 5th April 2022 when he deposed to the affidavit he had not fully recovered and has not fully commenced work at the office. He concluded by saying that the late filing of the Replying Affidavit has not in any manner prejudiced the Respondent in the conduct of the matter.
- [38] When the Respondent Bushiri filed heads of argument on the 16th March 2022 he was already in possession of the Replying Affidavit. The Respondent in paragraph 3 of his heads says that: "The Respondent reserves in full its right to supplement these heads in the event that condonation is granted in respect of the reply."
- [39] In the heads of argument Bushiri deals at paragraph 4 and 13 with the two points in *limine* which he had raised in his Answering Affidavit to which the Applicant replied to. The long and short of this is despite the late filing of the Replying Affidavit Bushiri was able to deal with the Applicants Affidavit in Replying in his heads of argument.
- [40] The Court in **SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1977 (3) SA 703 (D)** held that rule 30(3) provides that if at the hearing of such an application the Court is of the opinion that the step was improper or irregular it may set it aside or make any such order as it seems meet. The honourable Judge concluded as follows:

“It is I think beyond doubt that in considering such a case the Court has a discretion to be exercised judicially upon consideration of the circumstances to do what was fair to both sides.”

[41] In other decisions on this aspect it has been demonstrated that the attitude generally adopted by the courts is that it is entitled to overlook in proper cases any irregularity in procedure which does not work any substantial prejudice (See: **National Union of SA Student vs Meyer Curtis 1973 (1) SA 363 b(T) at 367 E-G**).

[42] The Respondent has failed to demonstrate any prejudice and has in fact been able to deal with all the Applicants averments stated in the Replying Affidavit in his heads of argument. Classen J in National Union of SA Students (*supra*) concluded as follows:

“Even if I am wrong in my conclusion and the Defendants procedural step was irregular this court has a discretion to condone in terms of Rule 27(3) the step and refuse to strike out the documents. It is not intended that a breach of the Rule should necessarily be visited with a nullity.”

[43] In the result the application in terms of Rule 30 (2) (b) to strike out the Applicant’s Replying Affidavit as an irregular step is dismissed with costs. Condonation for the late filing of the Replying Affidavit is hereby granted with costs.

[44] Having disposed of the interlocutory application I now move on to deal with the two points in *limine* raised by the Respondent.

FIRST POINT IN LIMINE – LACK OF JURISDICTION

[45] A point in *limine* is typically a question of law raised at the beginning of the hearing of a matter, before any evidence is led which point may if successful dispose of the dispute or bring the proceedings instituted to a conclusion (See

Allen & Others NNO v Gibbs and Others 1977 (3) SA 212 (SE). This is what the Respondent wants to achieve by submitting that this Court does not have jurisdiction.

[46] Bushiri maintains that because he and his family permanently left the Republic of South Africa on the 13th November 2020 with no intention of returning this puts them out of the jurisdiction of this Court. He assets that Applicant by stating in paragraphs 3 and 15 of the Founding Affidavit that he Bushiri previously resided at 8th Floor, Greenpark Corner, 3 Lower Sandton and left on 13 November 2020, clearly indicates that the Court has no jurisdiction. Bushiri says that he and his wife were not resident in the Republic of South Africa when these proceedings were initiated.

[47] The Respondent is clearly being technical and avoids reading Section 149(1) (a) and (b) in its right context. Section 149 (1)(a) of the Insolvency Act confers jurisdiction over every debtor who on the date of application is domiciled or owns or is entitled to property in the jurisdiction of the Court and (b) at any time within 12 months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the Honourable Court.

[48] It is common cause that Bushiri owes the Applicant a substantial amount of money he is therefore a debtor within the meaning of the section, secondly he until the 13 November 2020 resided within the jurisdiction of this Court and lastly he owns property within the jurisdiction of this Court.

[49] I accordingly have no hesitation in dismissing this point in *limine* with costs.

THE SECOND POINT IN LIMINE – FAILURE TO JOIN MRS BUSHIRI AS A RESPONDENT

[50] The Respondent relies on the provisions of Section 17(4) (b) of the Matrimonial Property Act which requires that “an application for the sequestration of a joint estate should be made against both spouses provided

that no application for the sequestration of the Estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the Applicant satisfies the Court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in Community of Property or the name and address of the spouse or debtor.

- [51] The first question to be answered is whether on the face of the marriage certificate it can be inferred that Bushiri and his wife are married in Community of Property and if so whether the Applicant knows about that.
- [52] Bushiri and his wife are Malawian Nationals. They married in Malawi in terms of the Laws of that country. The marriage certificate annexed to Bushiri's Answering Affidavit is silent as to whether it was in or out of Community of Property. Bushiri has not placed anything before this Court to prove that in terms of the Laws of Malawi a marriage concluded in terms of "The African Marriage (Christian Rights) Registration Act Cap 25.02" is a marriage in Community of Property.
- [53] The marriage was conducted by a minister in the same church which is owned by Bushiri. His name is not on the document what appears is a scribbled signature. So it is only the word of Bushiri. This Court has no other evidence to support Bushiri's version. I have difficulty in believing a person who is a fugitive from justice. His wife has also not filed any confirmatory affidavit although I would still regard her evidence with the same suspicion as that of her husband Bushiri.
- [54] The proviso to Section 17(4) (b) must be read in the context and against the background of all the evidence. The proviso reads that "no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the Applicant satisfied the Court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in Community of Property or the name and address of the spouse or debtor."

[55] Mrs Bushiri herself has become aware of the application and has not made use of the opportunity to intervene and protect her estate if any. There can only be one explanation for her silence that is that she knows that she is not a partner in Community of Property.

[56] I am justified that the Applicant had no other way of establishing the real position as regard the marital status of Bushiri outside what appears on the marriage certificate attached to the Answering Affidavit. The Applicant has in my view taken reasonable steps to establish the marital status of Bushiri and his wife. I in the result dismiss the second point in *limine*.

MERITS OF THE APPLICATION

[57] It is trite law that on the return date of the provisional order a Court has a discretion finally to sequester the Respondent's estate provided it is satisfied as to three essential elements namely:

- i) That the Applicant has established a claim against the Respondent.
- ii) That the Respondent has committed an act of insolvency or is actually insolvent.
- iii) That there is reason to believe that it will be to the advantage of creditors if the debtors estate is sequestered.

[58] A Respondent who opposes the final granting of an order must in his Answering Affidavit place facts before the Court to rebut the prima facie case established against him in the Founding Affidavit.

[59] The Applicant's reason for seeking the final sequestration of Bushiri is based on the provisions of Section 8(a) & (d) of the Insolvency Act number 24 of 1936 which reads as follows:

“A debtor commits an act of insolvency-

- a) If he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself with intent by so doing to evade or delay payment of his debts.
- d) if he removes on attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another.”

[60] The Respondent disputes being indebted to the Applicant even though judgment had been obtained against him by consent and he has failed to have the judgement rescinded. There is no appeal pending before any Court. The Applicant has in my view satisfied the first requirement in terms of Section 12 of the Act.

[61] It is the second requirement being the Act of Insolvency that is in issue. The Applicant says that Bushiri and his family have left the Republic of South Africa with the sole intent of evading to pay his creditors amongst them the Applicant. Bushiri disputes this and says that he had been planning since 2018 to relocate to Malawi. His sudden departure from the country is as a result of fear for his life and the safety of his family. He does not give details of acts of violence perpetrated against him or when or by whom those were made.

[62] One would have expected that Bushiri being a prominent figure within the religious sector in Gauteng to have reported such incidents of intimidation and threat to the authorities he has failed to do so.

[63] The debt which forms the subject matter of this application was incurred in 2019, judgment was granted because Bushiri defaulted with arrangements. In the final event he on the 9th November 2020 makes a verbal promise to pay on the 16 November 2020 well knowing that he shall by then have left the country permanently.

[64] Bushiri is a sophisticated person he has attorneys who act on his behalf in this country if he is not insolvent why has he not made the necessary funds to his attorneys to settle his debts. I am accordingly satisfied that he left the country in order to evade and delay payment of his debt.

[65] The question that remains is whether in fact Bushiri is insolvent or not. On the 24 March 2022 Bushiri's Attorneys Mr Levin addressed a letter to the Trustee attorney in which he states that Mr Bushiri was "not prepared to complete the statement of affairs and/or questionair forwarded by your office on the basis that he considers the sequestration application brought under case number 38991/202 an abuse of process."

[66] Further to the above in his answering affidavit at paragraph 84.3 Mr Bushiri states the following:

"I fail to see how the appointment of a trustee would prevent me from dissipating assets especially if the Applicant does not know what assets I have to tell the trustees what to protect."

[67] It is as a result of Bushiri's failure to divulge any information regarding the true state of his financial affairs which he in any case has to do statutorily. There are no facts to support his claim to solvency. He has placed nothing before this Court to prove that he is solvent. It is therefore safe to conclude that he is insolvent and left this country with the sole purpose to evade his creditors. He has no intention to return to the country voluntarily as he is a fugitive from justice.

[68] In **Nedbank Ltd v Johan Hendrick Potgieter 2013 GDR 2290 (GJS)** at **para 19 and 20** the Court held as follows:

[193] If the debtor is to persuade the court to exercise its discretion in his or her favour, he or she must place evidence before that Court that clearly establishes that the debts will be paid if the sequestration order

is not granted. If that contention is based on a claim that the debtor is in fact solvent then that should be shown by acceptable evidence.

[69] In the result I am persuaded that the Respondent Mr Shepherd Huxley Bushiri is insolvent and that it will be to the advantage of his creditors that his estate be administered by trustees. I accordingly make the following order:

ORDER

- i) The Provisional Sequestration order granted on the 20th November 2020 is hereby confirmed.
- ii) The estate of Bushiri Shepherd Huxley is placed in the hands of the Trustees for administration.
- iii) The costs of this application shall be the costs in the sequestration.

Dated at Johannesburg on this day of July 2022

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

DATE OF HEARING : 04 MAY 2022
DATE OF JUDGMENT : JULY 2022

FOR APPLICANT : Adv N Riley

FOR RESPONDENT : Adv CA Campbell

FOR TRUSTEES : Adv Marc Leathern
WITH : Adv Coetzee

