REPUBLIC OF SOUTH AFRICA

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

CASE NO: 19699/2021

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

Date: ....

In the matter between :

IQ BUSINESS (PTY) LTD Applicant

and

BRADLEY CHARLES BULL First Respondent

JUDGMENT

STRYDOM J :

[1] This is an application for the provisional sequestration of the respondent's estate on the basis that he committed an act of insolvency as envisaged in section 8(b) of the Insolvency Act, 24 of 1936 ("the Act"). The act of insolvency was not disputed in this matter.

[2] The respondent was previously employed by the applicant in its finance department and this is also common cause.

[3] The applicant alleged that the respondent is indebted to it in the amount of R13 828 288,71 by virtue of a court order handed down by this court dated 13 February 2020. This is also not disputed.

[4] The applicant is a creditor of the respondent in respect of the liquidated amount of not less than R100 (one hundred rand) and, in the circumstances, the applicant has the requisite *locus standi* to institute this application in terms of section 9(1) of the Act.

[5] The applicant, in its founding papers, alleged that the respondent caused the applicant significant financial loss due to his fraudulent and unlawful conduct whilst employed by the applicant.

[6] The applicant set out in its founding papers various acts of misappropriation of company funds and accused the respondent of fraud and theft amounting to R12 628 228,71.

[7] This caused summons to be issued against the respondent in the amount of R13 838 228,71 and judgment was obtained by default. Included in this amount was an amount of R1 210 000,00 claimed pursuant to an acknowledgement of debt signed by the respondent.

[8] The writ of execution led to a *nulla bona* return. This is also not disputed.

[9] In the founding affidavit, reference was made to a forensic report which allegedly confirmed that the respondent unlawfully and fraudulently

misappropriated the funds of the applicant. This report was not attached to the founding affidavit.

[10] It is then alleged that it is important that a trustee be appointed for the purposes of holding a financial inquiry in terms of which the respondent may be summonsed to give evidence at a meeting of creditors concerning the assets and funds of the applicant.

[11] In the answering affidavit the respondent baldly denied any allegation of fraudulent misappropriation of the applicant's funds.

[12] The causa for the judgment was stated by the applicant to be the fraudulent misappropriation of the applicant's funds but, despite this, the respondent provided no evidence to explain why the judgment was given against him or for whatever reason.

[13] The only defence put up by the respondent is that it would not be to the advantage of creditors to sequestrate him. He says he is a man of straw with no assets. He wanted the court to accept this and further to accept his bald denial that he did not misappropriate any of the applicant's funds.

[14] In respondent's answering affidavit, instead of providing explanations pertaining to why and for what purpose these funds were used, he bemoans the fact that if judgment is obtained against him it will affect his credit worthiness. He stated that the court should not provisionally sequestrate his estate and that the applicant should have instituted section 65 proceedings in the Magistrates Court.

[15] The applicant filed a replying affidavit dealing more with the disputed issue in this matter, i.e. whether it would be to the advantage of its creditors to sequestrate the respondent. In this affidavit, more particularity was provided pertaining to the alleged fraudulent transactions and the forensic report, referred to in the founding affidavit, was attached to this replying affidavit.

[16] The respondent argued that the forensic report constituted hearsay evidence as there was no confirmatory affidavit deposed to by the author of the report attached to the replying affidavit.

[17] For purposes of this judgment, this court does not have to decide whether the forensic report constituted hearsay evidence.

[18] On the issue if it constituted new matter as this report should have been attached to the founding affidavit, as was argued on behalf of respondent, the court also does not have to finally decide this issue, suffice to say that reference was made to the forensic report in the founding affidavit and the conclusions reached in this report were stated in the founding affidavit. A litigant who referred to conclusions reached in a forensic report in a founding affidavit would, in my view, be entitled to elaborate on these conclusions in a replying affidavit if the findings were challenged in an answering affidavit.

[19] As this is an application for a provisional sequestration order, it was expected of the applicant to make out its case on a *prima facie* basis for the relief it was seeking. See in this regard *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (AD). A conclusive case has been made out by

the applicant pertaining to the deed of insolvency and the respondent's inability to pay his debts. The only question for decision is whether the applicant has on a *prima facie* basis established that it will be in the interest of the creditors of applicant to provisionally sequestrate the respondent.

[20] The court in *Kalil* discussed the meaning of *prima facie* evidence in detail concerning provisional sequestration applications. The court pointed out that in some instances a *prima facie* case will be established with reference to allegations contained in a founding affidavit as a result of insufficient allegations or bald denials contained in an answering affidavit not raising a true factual dispute. In this regard it was found as follows at p 976 H-I:

> *"Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the onus lies, having to establish a prima facie case for the liquidation of the company seems wholly appropriate; but not so where the application is opposed and the real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the court should decide whether or not to grant an order without reference to the respondent's rebutting evidence."*

[21] This begs the question to consider when a factual dispute is raised or not in an opposing affidavit. It is trite that not all disputes raised in motion proceedings are, in and of themselves, genuine and *bona fide*. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26], Harms JA reiterated the principles as follows:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine the probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald and uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

[22] On behalf of the applicant, it was argued that for this reason it is necessary to take a robust approach to disputes in motion proceedings, for without taking such an approach, the respondent can simply avoid the consequences of his conduct by (i) simply denying the allegations of an applicant and (ii) making vague and unsubstantiated allegations of his own.

[23] It was then argued that considering the respondent's bald denials against specific allegations of fraudulent misappropriation of funds, the applicant has established a *prima facie* case with reference to its founding affidavit.

[24] It was in my view, important for this court to decide the issue of the advantage to creditors taking into account what happened to this funds and whether these funds were misappropriated by the respondent as was alleged by the applicant. These allegations made by the applicant cried

out for an answer from the respondent who was in a position of trust in the financial department of the applicant when these funds went missing.

[25] The respondent, however, in light of the very serious and damning allegations made by the applicant against him elected not to engage fully and meaningfully with the founding affidavit and in particular with the allegations of fraud and theft.

[26] Despite the allegation that the respondent misappropriated and stole R13,8 million, no explanation, save for a blanket denial, was provided. The respondent would have this court believe that the R13,8 million misappropriated merely vanished into the air.

[27] In my view, the respondent has not raised a factual dispute in this regard and the applicant has established on a *prima facie* basis that this amount was fraudulently misappropriated by him. This is an important finding when it is considered whether the applicant established on a *prima facie* basis whether it will be in the interest of creditors to provisionally sequestrate the respondent.

[28] Before further dealing with the advantage to creditors, it should be noted that there is a further way to establish a *prima facie* case and that is where a respondent was able to create a factual dispute. This situation will present itself where a respondent provided evidence, beyond a bare denial, challenging and contesting the allegations of the applicant. In such a case, all the affidavits should be considered and the court will have to decide whether a case for provisional sequestration was established on a

balance of probabilities. See *Kalil* at p 978 D-F where the court found as follows:

> *"This judgment would thus appear to lay down that 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 probabilities;"*

[29] As already found, my view is that the respondent has failed to create a genuine or *bona fide* dispute of fact and the court need not to consider the forensic report to find that the applicant has established on a *prima facie* basis that the respondent misappropriated and stole more than R13 million from the applicant.

[30] As far as the advantage to creditors are concerned, the Insolvency Act demands that there must be "*reason to believe"* that it will be to the advantage of creditors of the debtor if his estate is sequestrated. See in this regard *Commissioner, SARS v Hawker Aviation Partnership and others* 2006 (4) SA 292 (SCA) at para 29 where it was found as follows:

> *"The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The court need be satisfied only that there is reason to believe – not necessarily a likelihood but a prospect not too remote – that as a result of investigation and enquiry assets might be unearthed that will benefit creditors."*

[31] It is thus clear that it was not necessary for the applicant to prove actual advantage to creditors. This reduced requirement is no doubt in recognition of the fact that the creditor would not ordinarily have knowledge of the precise state of the debtor's financial affairs. The court is not restricted by what the debtor, or the respondent in this case, stated under oath, but will consider all the facts including the respondent's answer to these serious allegations and the probabilities. When this is done the first question that arises is what happened to the R13,8 million?

[32] The respondent elected not to take the court into his confidence to say anything in this regard.

[33] Whether all the money was spent, this court will not know, but there exists, on the probabilities, more than a likelihood that if an investigation and enquiry is conducted in terms of the Act, assets might be unearthed. In such an inquiry the respondent can be questioned and cross-examined as envisaged in the Act. This will undoubtedly be to the advantage of creditors. The applicant has at least made out a *prima facie* case for a provisional sequestration of the respondent.

[34] The applicant has shown and it was not disputed that the statutory requirements for a provisional sequestration order were met.

[35] Consequently, the applicant will be entitled to the relief it seeks.

[36] The applicant provided the court with a draft order which I will make an order of court in the following terms:

36.1 The estate of the respondent is placed under provisional sequestration;

36.2 All persons who have a legitimate interest in the outcome of this application are called upon to put forward their reasons why this court should not order the final sequestration of the respondent on 04 August 2022 at 10am or as soon thereafter as the matter may be heard.

36.3 A copy of this Order must forthwith be served on –

36.3.1 the respondent personally;

36.3.2 the employees of the respondent, if any;

36.3.3 all trade unions of which the respondent's employees are members, if any;

36.3.4 the Master of the High Court; and

36.3.5 the South African Revenue Service;

36.4 The costs of this application shall be costs in the sequestration of the respondent's estate.

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RÉAN STRYDOM

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant:	Adv. M. De Olivereira
Instructed by:	Schindlers Attorneys
For the 1st Respondent:	Adv. E. Coleman
Instructed by:	C. L Lourens Attorneys
	%: Ó Conell Attorneys
Date of Hearing:	07 March 2022
Date of Judgment:	08 March 2022