IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED: NO DATE: 14 October 2022	**CASE NO: 21/31519**
In the matter between:	

PSG KONSULT LIMITED	Applicant
And	
NICOLAS CHRISTIAAN NIEMAND	Respondent

JUDGMENT

VILJOEN AJ

[1] On 7 February 2022, this court provisionally sequestrated the estate of the respondent. A rule *nisi* was issued calling upon the respondent and interested third parties to show cause why a final order of sequestration should not be granted. This is the extended return date.

[2] In terms of section 12 of the *Insolvency Act*, 1936, the estate of a debtor may be finally sequestrated at the hearing pursuant to the rule *nisi* upon the creditor establishing:

2.1. a claim against the debtor of not less than R100.00;

2.2. that the debtor committed an act of insolvency or is insolvent; and

2.3. that there is reason to believe that sequestration will be to the advantage of creditors.

The debt

[3] The applicant alleges the respondent to be indebted to it in the sums of R214,640.00 and R97,978.07. These amounts are due to the applicant in terms of two bills of costs prepared and taxed in consequence of orders granted by the Gauteng Division, Pretoria of the High Court on 8 August 2019 and 27 August 2019.

[4] The respondent contends that in obtaining the aforesaid court orders the applicant committed perjury and misled the court. There are, according to the respondent, criminal proceedings pending in relation to these complaints.

[5] However, the respondent has taken no steps to have the orders rescinded in the period of some 3 years since they were granted. It is trite that until rescinded a court order remains valid and in force.

[6] I am accordingly satisfied that the applicant's papers establish on a balance of probabilities that the respondent is indebted to it in a sum exceeding R100.00.

Act of Insolvency

[7] The applicant caused writs of execution to be issued in respect of the taxed bills of costs. These were served personally on the respondent who stated in writing that he was unable to settle the amount demanded from him and that he did not possess any disposable property to satisfy the judgment debt. The respondent further deposed to an affidavit in which he declared that all movable property at his place of residence was the property of one Tiaan Niemand.

[8] Upon the aforesaid declaration and affidavit, the Sheriff issued a return of *nulla bona*.

[9] In terms of section 8(b) of the *Insolvency Act*, a debtor commits an act of insolvency if he fails to satisfy upon demand by the Sheriff a judgment granted against him or fails to indicate to the Sheriff disposable property sufficient to satisfy the judgment debt.

[10] The respondent claims not to be insolvent. This averment is, however, not substantiated by any evidence beyond the allegation that his assets are "*way more*" than the amounts claimed by the applicant. More specifically, the

respondent has not provided a comprehensive statement of his assets and liabilities. The bare allegation of solvency is an insufficient defence to the application for sequestration.

[11] Further, the respondent in his heads of argument states:

"*The Respondent has never said it was impossible to pay the amount claimed. The Respondent said that paying in one lump sum would not be possible and therefore, made an offer to pay in installments [sic], with the fifty percent (50%) being made as a lump sum offer*."

[12] This statement does not establish the respondent's solvency but is, if anything, a confirmation of his inability to pay his debts.

Advantage to Creditors

[13] The applicant needs to prove that there is reason to believe that the sequestration of the respondent will be to the benefit of creditors. An advantage to creditors does not have to be established as a fact. The applicant must show a reasonable prospect, not a likelihood, of advantage to creditors.[1]

[14] The respondent is the owner of four immovable properties. It is unclear to what extent these properties may be encumbered and what the respondent's liabilities regarding these properties might be. The respondent's papers do not suggest any significant liability.

[15] In the absence of an evidenced based challenge to the conclusion, I am persuaded that there exists a reasonable prospect of creditors receiving a

[1] Meskin & Co v Friedman 1948 (2) SA 555 (W)

not immaterial pecuniary benefit from the sequestration of the respondent's estate.

Discretion

[16] There remains to be considered my discretion to refuse to grant a final order of sequestration. I may not exercise such discretion in favour of the respondent unless special circumstances justify it. The onus of establishing such circumstances upon a balance of probabilities is upon the respondent.[2]

[17] The respondent filed a document headed "*appeal for stay of proceedings*". In that document, he sets out reasons why he believes his estate should immediately not be finally sequestrated. But for reference to his ill health and an unsubstantiated allegation that the applicant holds funds of the respondent, the document advances no grounds beyond those mentioned above for the stay of the sequestration proceedings.

[18] Despite his professed willingness to settle his debt to the applicant, he has not made any payment whatsoever.

[19] In *De Waard v Andrew and Thienhaus Ltd* the court held:[3]

"[T]the Court has a large discretion in regard to making the rule absolute: and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts;

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2 *Millward v Glaser* 1950 (3) SA 547 (W) at 553 to 554

3 1907 TS 727 at 733

and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[20] I am in respectful agreement.

[21] In the above premises, I make the following order:

21.1. The estate of the respondent is placed under final sequestration in the hands of the Master;

21.2. The costs of this application are costs in the administration of the respondent's estate.

H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 10 October 2022

Date of judgment: 14 October 2022

Appearances:

Attorneys for the applicant: HATTINGH & NDZABANDZABA ATTORNEYS

Counsel for the applicant: ADV R DE LEEUW

The respondent in person