



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 09245/2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO
DATE: 18 JANUARY 2023
SIGNATURE: ***ML SENYATSI***

In the matter between:

AFRIKA AMINA ENGINEERING CC

Applicant

and

MORWANA BERNARD MAGABE

First Respondent

MAMA JOSEPHINE MAGABE

Second Respondent

Delivered: By transmission to the parties via email and uploading onto Case Lines

the Judgment is deemed to be delivered. The date for hand-down is deemed to be 18 January 2023.

JUDGMENT

Summary:

Law of Insolvency - sequestration of separate estates after divorce, where parties were married in community of property - specifically whether a party's separate estate is liable for the delictual claim accrued by a former spouse and accordingly liable to be sequestrated - section 19 of Matrimonial Property Act of 1984 - provides protection to the estate of the innocent spouse insofar as the delict committed by the other spouse is concerned – to guard against any injustice done to an innocent spouse especially where a claim related to a delictual claim_which has not been paid during the marriage in community of property, such a claim is to be paid after its dissolution out of the half-share of the guilty spouse.

SENYATSI J:

Introduction

- [1] This application for sequestration of the respondent's separate estates was initially launched for sequestration of the joint estate.
- [2] After the launch of the application, the applicant was notified that the respondents were actually divorced. As a consequence, the original notice of motion was amended and the prayer for sequestration of the respondents' joint

estate was replaced with that of separate estates. There is no quibble with amendment notice and accordingly it is allowed.

Background

[3] The sequestration application emanates from the judgement debts of R 10 938 719. 01 together with interest calculated from 19 August 2019, an amount of R18 799.88 together with interest calculated from 22 August 2019 in respect of a taxed bill of costs under case number 35492/2016 and another taxed bill of costs in the sum of R59 614.93 when the exceptions taken by the first respondent were dismissed. The original judgment was taken against the first respondent following the collapse of Mafuri Infrastructure Africa (Pty) Ltd (“Mafuri”) of which the first respondent was a director together with others who were involved in the running of the company. The parties cited in those proceedings were help personally liable for the debts of Mafuri and the second respondent was not involved in the running of Mafuri and was in fact not cited in those proceedings.

[4] The main Judgment of R10.9 million had been obtained by default against the first respondent. The first respondent applied for rescission of that judgment and the application was dismissed with costs.

[5] The first respondent then sought leave to appeal from the Supreme Court of Appeal and the application was also dismissed with costs. The first respondent has not made payment to satisfy the judgment and the taxed bill of costs.

- [6] The present sequestration application is as a consequence of failure to satisfy the judgment and the taxed costs.
- [7] The writs for payment of R10.9 million and R59 614.93 were issued by the applicant. The sheriff's attempt to execute the writs were returned by the sheriff as no assets could be pointed out for the execution of the writs.
- [8] The applicant contends that an act of insolvency has been committed due to the nulla bona returns as well as the fact that the first respondent is indebted to the liquidators of Mafuri under case number 35493/2016 for, R2 786 283.23 and R3 280 000 and the bill of costs R49 185.05 pursuant to the costs order issued under the said case number.
- [9] As to the separation of the sequestration applications between the first and the second respondents, the application contends that since they were married in community of property at the time, the debts were incurred, it matters not that they had since been divorced.
- [10] The applicant submits that the respondents' separate estate should be sequestrated.

THE RESPONDENTS CASES

The First Respondent's case

- [11] The first respondent provided an affidavit for condonation for the late filing of his answering affidavit. In essence, he contends that the matter had to be postponed

several times so that he could secure the services of a legal representative. He provided detailed reasons for the delay in filing his answering affidavit which are to the effect that he did not deliberately and wilfully fail to comply with the court order to file his answering affidavit.

[12] His defence to the application for sequestration is that it will not be to the advantage of the general body of creditors and that the relief sought by the applicant is unsustainable.

[13] He also raises a *point in limine*, in which he claims that he may have been misunderstood at the hearing of 11 March 2020, when he submitted that he was in a position to raise some funds. He contends that what he meant was raising the funds to secure legal representation. As to how this point can be classified as a *point in limine*, it is hard for me to understand. As a consequence, the reference to a *point in limine* in his affidavit will not be considered and will be regarded as *pro non-scripto*.

[14] On the papers he denied that he was married to the second respondent and provided a decree of divorce.

[15] The first respondent conceded that the debt accrued while he was still married to the second respondent. He contends that his estate does not have equity and that the immovable property which is situated in Gauteng is the subject of an overdrawn Nedbank mortgage bond and his primary residence. He contends,

furthermore, that the property effectively belongs to the bank subject to the payment of the last instalment.

- [16] In amplification of his contention that the immovable property does not have equity, he attaches an Annexure B to his opposing answering affidavit, which is a document generated by net bank which shows a detailed history together with repayments of what appears to be pay instalments as well as the interest charged to the account by the bank. This document is not helpful or even relevant to support his claim as will be demonstrated later.
- [17] It is evident from the bank statement on the mortgage bond repayments that the first respondent seems to have funds to repay the loan. I say this because although several debit orders were not honoured there appears to be for instance, an amount of R243 000 that was paid on 26 January 2022. This will be a critical information that the trustee of the estate will consider in the management of the insolvent estate.
- [18] The first respondent contends that the bank statement demonstrates that the previous joint estate or his estate does not have equity on the immovable property. There is no previous joint estate to speak about as the respondents are now divorced. If the property referred to is in their names, the respondents are simply co-owners thereof. It is not clear from the statement that one can discern that there is no equity in the property.

[19] The second respondent also applies for condonation of the late filing of her answering affidavit. She admits that she was served with the application for sequestration of the joint estate on 20 March 2020. However, she takes a point that her divorce to the first respondent was finalised on 2 August 2019 and therefore is now clear that when she was served with the papers in these proceedings, the divorce had already been finalized

[20] After being served with the papers she consulted with her attorneys who drafted a letter to the applicant's legal representatives and informed them of the divorce that had taken place on 2 August 2019.

[21] There was a delay in replying to the letter by the applicant's legal representatives. and notice to oppose the application was filed on 3 April 2020. Her attorney did not file the answering affidavit within the time period prescribed by the rules.

[22] She states that on 13th May 2020, a notice to amend the applicant's notice of motion was received by her attorney which notice splits prayer 1 of the old notice of motion.

[23] The second respondent received an answering affidavit from her attorney which she could not commission between 14 May 2020 to 11 June 2020 due to the lockdown as a result of the COVID-19 State of Disaster as declared by the President of the Republic. She only received the answering affidavit from her attorney on 11 June 2020. She asked this court to condone the late filing of a

replying affidavit. She prays for condonation of the late filing of her opposing affidavit.

[24] She has raised the point *in limine* that she was divorced on 2 August 2019; and that there is no legal basis for the application for the sequestration of her estate. She furthermore contends that even if it is found that there is a legal basis that her estate be sequestrated, there is no allegation in the applicants founding papers that imputes the conduct of the first respondent to her. She prays for the dismissal of the application against her.

[25] The second respondent provides information on the previous properties that she and the first respondent purchased and sold whilst they were still married. She then gives information about the properties that the first respondent purchased, while they were still married without her consent and sold them again without her consent. She states that the first respondent without her consent, bought a house and car for his sister with the proceeds of the joint estate and how this eventually led to their divorce.

[26] She gives details of the cars that she maintains are available namely a BMW 645; Mercedes Benz E250; Mercedes Benz S600 and a BMW 7 series. She states that the BMW 7 series is registered in her daughter's name and that the Mercedes Benz E250 is registered in the second respondent's name because it was purchased by her. The BMW 645 is registered in the name of the first respondent and is paid up. She states that the Mercedes Benz S600 is registered in the name of the first respondents company MGB and is also paid up. She

contends that her estate has nothing to do with the first respondents alleged inability to pay the debts of his company which he has been held personally liable to pay.

[27] The second respondent further avers that their joint estate has not been divided following the divorce because its liabilities exceeds the assets due to the first respondent's conduct.

[28] She contends that she cannot be punished for the negligent conduct of the first respondent in conducting the affairs of Mafuri which she had nothing to do with because she is a teacher.

[29] She further contents that she should not be held liable for a claim based on delict against the first respondent and relies on the provisions of section 19 of the Matrimonial Property Act, No. 88 of 1984.

THE CONTROVERSIES IN THIS APPLICATION

[30] The legal issues to be determined in this application are the following:

- (a) Whether a case for condonation has been made;
- (b) Whether or not an advantage to the general body of creditors has been shown to justify the sequestration of the respondents' estates;

(c) Whether the provisions of section 19 of Matrimonial Property Act of 1984 offer protection to the second respondent for the delict committed by the first respondent.

THE LEGAL PRINCIPLES AND REASONS

Condonation for late filing of the pleadings

[31] It is well-trodden principle in our judicial turf that the court may, on good cause shown¹, condone any non-compliance with its rules².

[32] The circumstances or “cause” must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned.³

[33] In *Nedcor Investment Bank Ltd v Visser NO*⁴ it was held as follows:

“Rule 27(3) requires ‘good cause’ to be shown by the plaintiff. This gives the court wide discretion. *C Du Plooy v Anwes Motors(Edms) Bpk* 1983 (4) SA 212 (O) at 216 H-217A. The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (*Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 (A) at 353A. Secondly, it is for the plaintiff to satisfy the Court that its explanation is bona fide and not patently unfounded.”

¹ . See *Louw v Louw* 1965(3) SA 750 9 (E); *S.A. Breweries Ltd v Rygerpark Props (Pty) Ltd* 1992(3) SA 829(W).

² . See Rule 27(2) of the Uniform Rules of Court.

³ . See *General Accident Insurance Co. SA Ltd v Zampelli* 1988(4) SA 407 (C) at 410I-J.

⁴ 2002(4) SA 588(T) at 591.

[34] In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*⁵ the court stated the principle as follows:

“It is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional pre-requisite to the exercise of the court’s discretion. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives. Where there has been long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted. *Gool v Policansky* 1939 CPD 386 at 390. This is, in my view, particularly so when the applicant for the relief is the *dominus litis* plaintiff.”

[35] In *Tshivhase Royal Council v Tshivhase*⁶ the Appellate Court held that condonation is an indulgence which may be refused in cases of flagrant breaches of the rules. Condonation may also be refused where it would defeat the purpose or object of the rule of which the applicant is in breach.⁷

[36] Having considered the papers filed of record and the submissions on behalf of the parties, I am the view that the respondents have met the requirements for condonation of late filing of their answering papers.

Advantage to creditors

⁵ 2002(3) SA 87(W) at 93; See also *Sanford v Haley* NO 2004(3) SA 296 (C) at 302

⁶ 1992(4) SA 852 (A) at 859E-F

⁷ See *Small Business Development Corporation Ltd v Kubheka* 1990(2) SA 851 (T) at 854 B-855B.

[37] I now deal with the advantage to creditors in sequestration. One of the basic features of our insolvency law is that the creditor who applies for sequestration of a debtor, should show in his/her papers that there will be an advantage to the general body of creditors. Sections 10 (c) of the Insolvency Act states that if the court to which the application has been launched is of the opinion that prima facie there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.⁸

[38] The applicant bears the onus of establishing that there is reason to believe that sequestration will be to the creditors advantage. This is established if there are facts proved which indicate that there is a reasonable prospect, not necessarily a likelihood, but a prospect which is not too remote, that some pecuniary benefit will result to creditors.⁹

[39] In *Stratford and Others v Investec Bank Ltd and Others*¹⁰ and following the approach in *Meskin*¹¹ the Constitutional Court stated the following:

“[43] In terms of the Insolvency Act, a court may grant a sequestration order either provisionally¹² and finally¹³ if ‘there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated’¹⁴. It

⁸ See *Ex Parte Arntzen (Nebank Ltd intervening)* 2013 (1) SA 49 (KPZ) at para 1. *Body Corporate of Empire Gardens v Sithole & Another* 2017 (4) ...

⁹ See *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559

¹⁰ 2015 (3) SA 1 (CC) at para

¹¹ See footnote 6 supra

¹² See section 10 of the Act

¹³ See section 12 of the Act

¹⁴ See sections 10 (c) and 12 (1) (c)

is the petitioner who bears the onus of demonstrating that there is reason to believe that this is so.¹⁵ In *Friedman* the Court held :

‘[T]he facts put before the Court must satisfy it that there is a reasonable prospect not necessarily a likelihood, but a prospect which is not too remote that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient.’¹⁶

[44] The meaning of the term ‘advantage’ is broad and should not 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.¹⁷ *Meskin et al* state that:

‘the relevant reason to believe exists where, after making allowance for the anticipated costs of sequestrated, there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some

¹⁵ See *Trust Wholesalers & Woolens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) at 112 C - D

¹⁶ See *Meskin & Co v Friedman* at 559 (supra)

¹⁷ See *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (4) AT 1069H – 1070A and for friendly sequestrations *Hillhouse v Stott*, *Freban Investments (Pty) Ltd v Itzkin*; *Botha v Botha* 1990 (4) SA 580 (W) at 585H and 586A-C and *Epstein v Epstein* 1987 (4) SA 606 (C) at 609 B -D

other means of dealing with the debtors predicament is likely to yield a larger such payment. Postulating a test which is predicated only on the quantum of the pecuniary benefit that may be demonstrated may lead to an anomalous situation that a debtor in possession of a substantial estate but 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 the order.¹⁸

[45] The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the dicta outlined in Friedman.¹⁹ For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body²⁰ that there is a substantial estate from which the creditors cannot get payment except through sequestration;²¹ or that some pecuniary benefit will result for the creditors.”²²

[41] Having regard to the approach of our courts in assessing whether sequestration will be for the advantage to the body of creditors, I am satisfied that the applicant has met the threshold to show the advantage to creditors. Although the first respondent has argued that no benefit will be derived for the benefit of the creditors by sequestrating his estate, this submission has no factual and legal

¹⁸ See Meskin et al Insolvency Law Service Issue 42 (2014) at 2.4.1.

¹⁹ Supra

²⁰ See London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (D) at 591 G

²¹ See Realization Ltd v Ager 1961 (4) SA 10 (D) at 11 D - E

²² BP Southern Africa (Pty) Ltd v Furstenburg 1966 (1) SA 717 (O) at 720 E - G

basis. He bases his contention on the proposition that his dwelling house, which is also his primary residence, has no equity as the property is bonded to a bank. This is the exercise in compulsory sequestration that is impossible for the applicant, as a creditor, to make as the co-operation of the affected debtor cannot be expected. The trustee will have the ability to assess the assets of the insolvent estate once he or she takes charge thereof.

The Provisions of Section 19 of the Matrimonial Property Act 88 of 1984

[42] Section 19 of the Matrimonial Property Act 88 of 1984 deals with liability for claims based on delict committed by spouses. This section states that when a spouse is liable for the payment of damages, including damages for non-patrimonial loss by reason of a delict committed by him or when a contribution is recoverable from a spouse under the Apportionment of Damages Act 1956 (Act 34 of 1956) such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only insofar as he has no separate property from the joint estate. Provided that insofar as such damages, contribution or costs have been recovered from the joint estates an adjustment shall upon the division of the joint estate be effected in favour of other spouse or his estate as the case may be.

[43] The purpose of section 19 of the Matrimonial Property Act is to provide protection to the estate of the innocent spouse insofar as the delict committed by the other spouse is concerned. This is so because, if the estate is affected, during

marriage, the adjustment can be done in favour of the innocent party during the division of the estate, for instance at divorce or at death.

[44] In *Pelser N.O and Another v Lessing N.O and Others*²³ the court held as follows in applying section 19 of the Matrimonial Property Act 88 of 1984, quoting and applying the views expressed in Hahlo 5:²⁴

“40. In Hahlo 5, which saw the light in 1985, shortly after the promulgation of the Act, the learned author sticks to his earlier approach on the subject when he says the following on p184:

‘If damages for a delict, committed by one of the spouses have been paid during the marriage out of the joint estate, an adjustment in favour of the other spouse or his estate takes place upon the division of the joint estate. A delictual liability which has not been paid during the marriage has to be paid after its dissolution out of the half share of the guilty spouse. (Emphasis added)

The learned author does not appear to offer any authority of this last proposition. This first proposition is based on the provisions of Section 19...

²³ (5034/2013) [2014] ZAGPPHC (25 July 2014) at para ...

²⁴ H.R Hahlo *The South African Law of Husband and Wife* 5th ed. from p184

41. In *Nedbank Ltd v Van Zyl*²⁵ the learned Chief Justice deals with the subject but, at 477 BC refrained from expressing a view as to the precise nature of the post nuptial liability of the spouses for community debts. However, that case related to contractual or 'ordinary' debts and not delictual debts."

[45] Prinsloo J in *Pelser*,²⁶ after considering *Hahlo* stated the following:

"44. Where section 19 is silent on the question of delictual debt, not paid during the existence of marriage in community of property, it seems to me that the correct approach is that a delictual liability which has not been paid during the marriage in community of property has to be paid after its dissolution out of the half-share of the guilty spouse." (My own emphasis)

[46] I am in agreement with the approach adopted in *Pelser* as this ensures that no injustice is done to the innocent spouse especially when the claim relates to a delict as in this case.

[47] Mr. Daniels SC referred me to the *Nedbank Ltd v Van Zyl*²⁷ case in his attempt to persuade me to find that the second respondent's separate estate is liable for the delictual claim and accordingly liable to be sequestrated. This principle is correct for contractual debts but holds no water for delictual debts.

²⁵ [1990] ZASCA 12; 1990 (2) SA 469 (AD) at 476 -477

²⁶ *Supra*

²⁷ [1990] ZASCA12; [1990] 2 ALL SA 637 (AD);1990(2) SA 469 (AD).

[48] I was also referred to *BP Southern Africa Pty Ltd v Viljoen*²⁸. That case related to the debts which were incurred for the necessities of the joint estate, and its facts are clearly distinguishable from the facts of the case before me. Similarly, the facts of the case are not applicable to the present case.

[49] It is common to the parties that the Court declared the first respondent and other people who were running the business of Mafuri to be personally held liable for the debts incurred by it of which they were the directors. The piercing of the corporate veil by our courts is normally done in circumstances where a director runs the affairs of the company in an improper manner. It is not a controversy that the second respondent was not cited in that action and was also not involved in the running of Mafuri.

[50] Accordingly, there is no legal basis why the second respondent's separate estate should be affected by the sequestration of the first respondent. I hold this view because at the time of the application for sequestration the parties were already divorced. It matters not if the estate of the parties was not divided after divorce.

[51] Consequently, the following order is made:

- (a) The estate of the first respondent is placed under final sequestration and the costs of this application shall be the costs in the sequestration of the first respondent's estate;

²⁸ 2002 (5) SA 630 (O) at 636 to 637.

- (b) The application for sequestration of the second respondent is dismissed with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 07 November 2022

DATE JUDGMENT DELIVERED: 18 January 2023

APPEARANCES

Counsel for the Applicant: Adv AJ Daniels SC

Instructed by: Richter Attorneys

Counsel for the First
Respondent: Adv T Mathopo

Instructed by: DG Mafuya Attorneys

Counsel for the Second
Respondent: Adv GH Meyer

Instructed by: AJ Van Rensburg Inc.