Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

CASE NO: 28019/2020

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

4 August 2023 .....
DATE
SIGNATURE

In the matter between:

BRIAN KAHN INC Applicant

and

NYEZI, BRIAN THABO First Respondent
(Born on […] December […], Identity number: […])
(Married in community of property to the second Respondent)

NYEZI, MAKHOSAZANA COLLEEN Second Respondent
(Born on […] December […], Identity number: […])
(Married in community of property to the first Respondent)

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Brian Kahn Incorporated, seeks the final sequestration of the joint estate of Brian Thabo Nyezi, the first respondent, and Makhosazana Colleen Nyezi, the second respondent ("the joint estate"). The first respondent was born on […] December […], having identity number […], married in community of property to the second respondent, born on […] December […], having identity number […].

[2] The provisional sequestration order granted on 2 February 2022 was made returnable in the form of a *rule nisi* on 9 May 2022. The return date of 9 May 2022 was extended subsequently to 18 July 2022, to which the first and second respondents did not object and thereafter Acting Judge Van Aswegen handed down judgment on 17 September 2022 in which she extended the return date to 28 November 2022.

[3] On 26 November 2022 or thereabouts, the first respondent delivered an application for leave to appeal against the judgment and order of Van Aswegen AJ extending the return date to 28 November 2022. Thereafter the return date was again extended and the application for the final sequestration of the joint estate came before me on 22 February 2023. The first respondent appeared in person before me on 22 February 2023.

[4] The first and second respondents did not file further affidavits in respect of the merits subsequent to the provisional order and thus the facts as regards the merits of the application for sequestration, as they stood immediately prior to the granting of the provisional order, remain unchanged.

[5] The applicant is a creditor of the joint estate in the amount of R1 045 768.09 calculated as to the capital sum of R835 848.30 together with interest thereon of

R249 146.79 less a payment of R39 227.00 made by the first respondent to the applicant.

[6] The bulk of the capital sum claimed by the applicant comprises the money judgment of Nichols J ('the first court order'). In addition thereto, various costs orders arising from subsequent applications, including the respondents' application for the rescission of the Nichols J judgment that was dismissed with costs, together with costs incurred in the Sheriff's attempts to execute on costs orders granted in favour of the applicant, are included in the applicant's claim in the amount of R1 045 768.09.

[7] Nichols J's judgment was based on a settlement agreement signed by the first respondent pursuant to which an application for payment was brought by the applicant. Notwithstanding that the debt upon which the applicant sued was the first court order and not the settlement agreement, the first respondent raised a defence under section 15(2)(b), s15(2)(h) and s15(6) of the Matrimonial Property Act, 1984 ('the MPA'), alleging that the settlement agreement was invalid. The settlement agreement is not impugned under the relevant provisions of s15 of the MPA in that the section in relevant part provides as follows:

"(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse -

…

(h) bind himself as surety; …

(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business."

[8] The dispositive point in respect of the first respondent's defence under s15 of the MPA is that the settlement agreement was not a deed of suretyship. The first respondent did not bind himself as a surety in terms of the settlement agreement. Accordingly, s15(2)(h) is not applicable to the circumstances before me.

[9] Furthermore, the first respondent entered into the settlement agreement in the ordinary course of his profession, trade or business, resulting in the consent of the second respondent to the settlement agreement not being necessary by virtue of s15(6) of the MPA.

[10] This arises from the conclusion of the settlement agreement by the first respondent because of disputes that followed on the first respondent mandating the applicant to act on behalf of Rizita Mining Resources (Proprietary) Limited ("Rizita") in other litigation, and the first respondent's statement that he "entered into a settlement agreement with the applicant on 24 June 2017 as a sole shareholder, employee and Director."[1]

[11] Nichols J's judgment stands. Haddon AJ delivered judgment in the first respondent's application for the rescission of Nichols J's judgment and dismissed the application for rescission as well as the application that the writ of execution issued pursuant to Nichol's judgment, the first court order, be set aside. The costs ordered by Haddon AJ against the first respondent are included in the applicant's claim of R1 045 768.09.

[12] Accordingly, the debts comprising the sum of R1 045 768.09 exist, are liquidated and owed by the first respondent, and hence the respondents' joint estate, to the

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1 CaseLines 005-8, para 3.8.

applicant. Thus, the applicant is a creditor in the first and second respondents' joint estate in the sum of R1 045 768.09.

[13] Subsequent to the judgment and order of Nichols J, the applicant attempted to execute thereupon. The acts of insolvency of the first respondent, which acts of insolvency bind the respondents' joint estate, include the first respondent's failure to satisfy the Sheriff's demands in terms of s8(b) of the Insolvency Act 24 of 1936 ("the Insolvency Act").

[14] The first respondent, during November 2019, in addition, wrote to the applicant stating that a "reasonable settlement can be reached excluding interest and that settlement can be made an order of court".[2] The suggestion of a settlement by the first respondent was made in respect of the capital sum of R725 000.00 together with the costs thereon, being an act of insolvency in terms of s8(e) of the Insolvency Act.

[15] The aforementioned comprised only two of various items of conduct amounting to acts of insolvency by the first respondent in the course of his dealings with the applicant. These acts of insolvency bind the joint estate of the respondents.[3]

[16] In any event, it is apparent that the joint estate is insolvent.

[17] In respect of the assets of the joint estate, the notice of attachment prepared by the Sheriff upon attempting to execute the order of Nichols J, reflects assets of approximately R5 500.00, comprising furniture and other items. No further items were available. The remaining items were identified as being those of BUBJ Connection,

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2 CaseLines 001-29

3 *BP Southern Africa (Pty) Ltd v Viljoen & 'n Ander* 2002 (5) SA 630 (A) at 637E-I and 638C – 639E; *Standard Bank of South Africa v Sewpersadh & Another* 2005 (4) SA 148 (C) at [7].

which should in fact be NUBJ according to the CIPC document attached by the applicant to the application, of which the respondents were directors.

[18] Execution of the costs order granted pursuant to Nichols J's judgment, resulted in a *nulla bona* writ being returned by the Sheriff. The costs order under the *nulla bona* writ was subsequently paid by the first respondent in the amount of R39 000.00 and accordingly the applicant did not rely upon the *nulla bona* for the purposes of this application other than submitting that the *nulla bona* return served to demonstrate that there were no additional assets available to the respondents as proof of their insolvency.

[19] The only other assets identified are the respondents' shares in Rizita Mining Resources (Proprietary) Limited. Those shares however are worthless in that Rizita was placed in final liquidation by way of an order granted by Wepener J during 2013. The liquidation of Rizita is in fact a red herring in that the liquidation order of Rizita is irrelevant to this application. That is because the applicant's claim relied upon the order of Nichols J and it is pursuant thereto that the applicant instituted these proceedings. Notwithstanding, the first respondent relied upon the liquidation of Rizita as a defence to the final sequestration order and thus I shall deal with those proceedings hereunder.

[20] Wepener J granted the final liquidation order in respect of Rizita on 3 December 2015. The first and final liquidation and contribution account[4] of Rizita reflects a deficit of more than R400 000 in Rizita. Accordingly, there is no value in the Rizita shares.

[21] The first respondent argued before me that the proceedings were vitiated in that Wepener J stated during the proceedings before him on 28 November 2022, that he

[4] The first and final liquidation and contribution account of Rizita was confirmed by the Master of the High Court on 23 February 2021.

was “doing the (applicant’s) attorney ‘a favour’”. The first respondent appeared before Wepener and informed him that the provisional order could not be extended due to the pending application for leave to appeal the previous order of Van Aswegen AJ extending the provisional order. The first respondent submitted that due to Wepener J referring to “a favour” that he was doing for the applicant’s attorney, the first respondent had a reasonable apprehension of bias on the part of Wepener J in favour of the applicant and against the respondents in those proceedings. As a result, the first respondent argued that the proceedings were vitiated and stood to be set aside.

[22] A consideration of the context in which Wepener J made the impugned statement reflected that there could not be any reasonable apprehension of bias as a result of the statement. The applicant’s counsel and attorney were admonished by Wepener J during the course of those proceedings in that he had allowed the matter to be enrolled before him for the purpose of hearing argument on the extension of the provisional sequestration order. Wepener J, in the process thereof, refused to permit the applicant’s request to allow the applicant to stand the matter down for an hour or two in order to obtain a return date from the Registrar. Wepener J refused to allow the request and allowed the applicant to stand the matter down for 15 minutes in order to obtain the required date from the Registrar stating that in allowing the matter to stand down, he was doing the applicant “a favour.” Obtaining a future date to which the provisional order stands to be extended is a formality arising from the stipulated form of provisional orders. It had nothing to do with the content of the final order.

[23] Nothing in Wepener J’s statement in respect of the alleged “favour,” in standing the matter down for the applicant to obtain the required date, considered in the context of an extremely busy court roll and the frustrations resulting from inefficiencies in the administration of the system, gives rise to a reasonable apprehension of bias. A return

date had to be obtained via the Registrar and Wepener J's allowing the matter to stand for 15 minutes to obtain that date comprised a necessity in order to finalise those proceedings. It was an indulgence to the applicant in the context of a busy court roll, and could not give rise to a reasonable apprehension of bias in favour of the applicant and against the respondents on the part of Wepener J.

[24] Moreover, the proceedings for the final order of sequestration came before me and not before Wepener J. Accordingly, the alleged reasonable apprehension of bias, which allegation I reject, is irrelevant to the proceedings before me.

[25] In addition, the respondents admitted to having creditors other than the applicant. The respondents declined however to identify those creditors or to furnish the amount of the joint estate's indebtedness to those creditors.

[26] Accordingly, the facts indicate that the respondents' joint estate is insolvent, manifestly so. This is because the liabilities of the joint estate exceed the assets.

[27] In respect of the requirement of an advantage to creditors in order for the joint estate to be finally sequestrated, the applicant relied upon the judgment of Roper J in *Dunlop Tyres (Pty) Ltd v Brewitt,*[5] that:

"It will be sufficient that a creditor in an overall view on the papers can show, for example, that there is reasonable ground for coming to the conclusion that on a proper investigation by way of an enquiry and section 65 of Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."

[28] The applicant contended that in the light of the respondents' expensive lifestyle and their business activities, the respondents have access to cash resources that they have concealed and not made available in order to discharge the debt to the applicant.

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5 *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580) (W) at 583D.

Alternatively, the respondents have access to significant amounts of credit that serve to increase the indebtedness of the joint estate to the detriment of the creditors of the joint estate.

[29] The applicant referred me to various of the respondents' social media posts reflecting the lifestyle of the respondents, including travelling on a chartered aircraft during May 2019 after Nichol J's order was delivered and after the first respondent failed to satisfy that order. An additional example was the first respondent stating in a social media post that his company in Postmasburg could possibly be listing on the JSE. An Arabic desert adventure in the United Arab Emirates staying in an apparently upmarket hotel and business class air travel between London and Dubai all indicate a lifestyle requiring access to financial resources. A social media post on 13 August 2019, that the first respondent's company had obtained a strategically positioned coal licence approximately 3.8 km from an Eskom Power Station, is enlightening.

[30] In addition, the first and second respondents are both directors of numerous entities, apparently involved in the mining and other industries requiring large amounts of capital.

[31] The aforementioned reflect that there is an advantage to creditors in the sequestration of the joint estate in the light of what appears to be concealed cash resources being used by the respondents and not paid over to the applicant, or that the respondents have access to significant credit, thus furthering the indebtedness of the joint estate to the detriment of creditors.

[32] Accordingly, it is in the interests of justice that the respondents' joint estate be sequestrated and that it be wound up finally in terms of an orderly process that is fair to all creditors in terms of the Insolvency Act.

[33] The respondents relied, however, in addition to the absence of personal service on the second respondent, upon various applications for leave to appeal that the first respondent contended ought to have suspended the proceedings at various stages.

[34] The applications for leave to appeal brought by the first respondent stand to be divided into two categories.

[35] The first category comprises those applications for leave to appeal delivered outside of the permitted 15-day time period. This category includes the liquidation order of Rizita in respect of which the application for leave to appeal was brought for 4½ years after the order was granted, the order of Nichols J in respect of which the leave to appeal application was brought some two years after the order was made, and the order of Van Aswegen AJ, in respect of which the application for leave to appeal was issued approximately two months after Van Aswegen AJ granted the order extending the return date of the provisional sequestration.

[36] The relevant applicable principle in respect of applications for leave to appeal issued outside of the permitted time period is that the right to leave to appeal lapses if the applicant is issued out of time and condonation is not granted. An application for condonation for the late delivery of the application for leave to appeal does not serve to suspend the judgment in respect of which the application for leave to appeal is delivered. It is only the grant of condonation for the late delivery of the leave to appeal application that suspends the judgment.[6]

[37] It is apparent that condonation has not been granted for the late issue of the three applications for leave to appeal the court orders abovementioned and the right to

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6 *Panayiotou v Shoprite Checkers (Pty) Ltd & Others* 2016 (3) SA 110 (GJ) [15]; *Modderklip Squatters v Modderklip Boerdery (Pty)Ltd* 2004 (5) SA 40 (SCA) at [46].

leave to appeal all three orders lapsed accordingly. The three court orders stand and are not suspended by the applications for leave to appeal.

[38] Given that the order of Nichols J remains extant, the first respondent cannot allege that the Nichols J judgment and the first Court order are invalid. The applicant's claim is premised on the first Court order, being the Nichols J judgment and order and not on the settlement agreement as stated afore. Accordingly, the application for leave to appeal did not serve to suspend the Nichols J order which remains intact.

[39] Turning to the second category of applications for leave to appeal, this category includes those applications under the provisions of the Insolvency Act. A final order of sequestration is appealable in terms of s150 of the Insolvency Act, subject to the relevant provisions of the Superior Courts Act, 2013.

[40] Section 150(5) of the Insolvency Act, however, provides in effect that only orders granted under the Insolvency Act in terms of s150 are appealable. That provision serves to exclude orders for the provisional sequestration of an estate as well as extensions of those orders, being the extensions granted by Molahlehi J, Van Aswegen AJ and Wepener J in the course of these proceedings. Such orders extending the return date do not in any event meet the requirements of orders having final effect[7] in terms of s17 of the Superior Courts Act and thus are not appealable in any event.

[41] Accordingly, there is no right to appeal against the second category of applications for leave to appeal and the orders falling in terms of that second category are not suspended by the purported applications for leave to appeal issued in respect thereof.

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[7] *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 SCA.

[42] It is appropriate to mention, that the first respondent failed to take steps in order to progress the applications for leave to appeal, particularly that brought in respect of the order of Nichols J. The same applies in any event in respect of the final liquidation order of Rizita granted by Wepener J.

[43] Thus, the various purported applications for leave to appeal issued in the course of these proceedings did not serve to assist the respondents in opposing the application for final sequestration of the joint estate. Those applications did not serve to suspend the orders in respect of which they were granted.

[44] As regards the issue of service, particularly in respect of the second respondent, both respondents delivered a notice of intention to defend the application, signed by each of them and in which they agreed to accept electronic service. They furnished the electronic mail ("email") address of the first respondent as their chosen address for service. The first respondent advised that the second respondent chose to use his email address for service in the sequestration application proceedings.

[45] Both respondents delivered answering affidavits opposing the application and did so without the issue of service being raised in respect of the application. It was only shortly before the return day dealt with by Van Aswegen AJ, that the second respondent delivered a supplementary affidavit in which she raised the issue of personal service and in which the second respondent confirmed her residential address at 54 Oldensway, Kelvin, Sandton. The second respondent also confirmed that she had access to CaseLines where all the documents in this matter are uploaded.

[46] Section 9 of the Insolvency Act requires that an applicant must "furnish" the sequestration application to the debtor. The Constitutional Court in *Stratford & Others v*

Investec Bank Ltd & Others[8] held in the context of service on an employee, that "furnish" requires that applications be made available in a manner reasonably likely to make them accessible.

[47] The SCA's decision in *EB Stream Co (Pty) Ltd v Eskom Holdings SOC Ltd*[9] found that whilst the furnishing of an application is peremptory, the method of doing so is directory. The SCA's finding in this regard was accepted by the Constitutional Court.

[48] Furthermore, the SCA in *Chiliza v Govender*[10] found that the word "furnish" encompasses "several forms of notification that may not entail personal service".

[49] As to the requirements of the Practice Manual of this Division that personal service is required in respect of sequestration applications, being personal service of both the application and the provisional order upon the respondents, the Practice Manual does not bind judicial discretion. This is particularly so in matters such as the one before me where concerted attempts appeared to have been made by the respondents to avoid personal service of the relevant processes and documents upon the second respondent.

[50] Furthermore, s9 of the Insolvency Act gives a court the power to dispense with furnishing a copy of an application to the debtor where the court is satisfied that it is in the interest of creditors to dispense with it.

[51] The applicant referred me to *Portion Tudor Rose Lodge (Pty) Ltd v Wessels,*[11] in which the Gauteng Division, Pretoria, condoned the absence of personal service upon a respondent.

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8 *Stratford & Others v Investec Bank Ltd & Others* 2015 (3) SA 1 (CC) at [40].
9 *EB Stream Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA).
10 *Chiliza v Govender* 2016 (4) SA 397 (SCA).
11 *Portion Tudor Rose Lodge (Pty) Ltd v Wessels* 2012 JDR 1279 GNP.

[52] The applicant requested that I condone the absence of personal service on the second respondent in this matter and I intend to do so.

[53] Given the facts set out above, it is apparent that the second respondent is aware of the application for the sequestration of the joint estate. She participated in the provisional proceedings and received electronic service of the subsequent documents, court orders and process at her chosen email address being that of the first respondent. Furthermore, the second respondent delivered the supplementary affidavit raising the issue of personal service.

[54] Moreover, Wepener J on 28 November 2022, gave certain orders aimed at ensuring that this application finally came to a head and was finalised on 22 February 2023. Wepener J ordered that the second respondent avail herself to receive personal service, which she failed to do. Wepener J catered for that eventuality and ordered the first respondent to bring the proceedings including the provisional order and the extensions, to the second respondent's attention.

[55] The applicant's attorney of record provided an affidavit setting out the various efforts made to serve on the second respondent, all without success.

[56] It is apparent that all orders have now been served in compliance with Wepener J's order of 28 November 2022. These include Wepener J's order, the provisional sequestration order and the subsequent extensions of the provisional sequestration order. They have all been adequately furnished to both the first and second respondents. The first respondent, to his credit, confirmed shortly prior to the proceedings before me on 22 February 2023, that the second respondent was aware of the proceedings before me.

[57] In respect of the formalities necessary for the grant of a final sequestration order, the applicant proved service on the Master of the High Court, the South African Revenue Service and that there were no employees or trade unions affected by the application and any order that I might make. Furthermore, the applicant proved that it procured a security bond timeously.

[58] Thus, the applicant met the requirements for the final sequestration of the joint estate in terms of the Insolvency Act, which require an act of insolvency, and the further requirements referred to afore by me. Accordingly, the applicant met both the substantive and the procedural requirements of the Insolvency Act entitling it to a final sequestration order against the first and second respondents' joint estate.

[59] Insofar as the first respondent argued that he should be entitled, equally with other litigants before the courts, to pursue the applications for leave to appeal, the fact of the matter is that those applications were brought out of time and as a result, the right to leave to appeal as set out in the matter of *Panayiotou* referred to above, lapses. Absent the grant of condonation in respect of the late delivery of each of those applications, the order against which the application is brought is not suspended. Accordingly, the orders, particularly that of Nichols J, remains extant and are not suspended upon this application coming before me.

[60] Two further points require dealing with. Firstly, it was not common cause between the parties that the application for the liquidation of Rizita was erroneously sought or erroneously granted. The applicant's counsel explained how the statement that it was common cause between parties that the application for the liquidation of Rizita was erroneously sought and/or granted ("the statement"), came to be included in the parties' joint practice note that served before the court. In short, the statement was an insertion by the first respondent into the joint practice note. It appeared in track

changes in the practice note. It was not a statement with which the applicant agreed. The applicant explained that the applicant did not agree that the application for Rizita's liquidation was erroneously sought and nor was it erroneously granted.

[61] In respect of the first respondent's averment that Mr Clark, counsel for the applicant, had sought to mislead Van Aswegen AJ, there is no substance in that allegation, which was explained to me by Mr Clark. The statement was apparently misconstrued by the first respondent was withdrawn by Mr Clark in that he stated that he did not stand thereby.

[62] In the result, by virtue of the aforementioned, I grant the following order:

1. The joint estate of the first respondent, Brian Thabo Nyezi, and the second respondent, Makhosazana Colleen Nyezi, is placed under final sequestration.

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CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 4 August 2023.

COUNSEL FOR THE APPLICANT:	Mr M Clark.
INSTRUCTED BY:	Brian Kahn Incorporated.
FOR THE RESPONDENTS:	Mr B T Nyezi in person.
DATE OF THE HEARING:	22 February 2023.
DATE OF JUDGMENT:	4 August 2023.