IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 7833/2016

6/7/2018

In the matter between:

L M V **Applicant**

and

M V **Respondent**

JUDGMENT

MAAKANE AJ

INTRODUCTION:

[1]

[1.1] This is an application for the provisional sequestration of the estate of Respondent. Applicant is the ex-wife of Respondent.

[1.2] Respondent is opposing the application

[2] **BACKGROUND:**

[2.1] It is common cause that both the Applicant and Respondent were married to each other out of community of property. The marriage was unsuccessful and subsequently dissolved by way of divorce.

[2.2] During divorce proceedings, the parties concluded a written settlement agreement which was made an order of the Court.

[2.3] In terms of the said settlement agreement, Respondent was ordered to pay maintenance towards the parties' minor child.

[2.4] It is common cause that over a period of time, Respondent defaulted with this maintenance obligation and fell Into arrears.

[2.5] This default prompted Applicant to institute proceedings in the Magistrates' Court of Roodepoort against Respondent, for the recovery of outstanding money. She subsequently obtained judgment in the amount of R45,610.00 against him. On 12 May 2015, a warrant of execution was issued by the said Magistrates' Court.

[2.6] Acting on the strength of the warrant, that the Sheriff did on 11 June 2015 attach a motor vehicle described as, a Renault Clio sedan with registration letters and numbers: [….]. The car apparently belongs to Respondent. The sheriff did not remove the vehicle at that time.

[2.7] On 23 September 2015, the sheriff again went to Respondent's premises in order to remove the attached vehicle. However, he was unable to do so. It appears that the vehicle was not at that stage in Respondent's possession, and also outside the jurisdiction of the Potchefstroom sheriff.

[2.8] On 13 June 2016, the sheriff made yet another attempt by visiting Respondent's premises. Again he was unable to remove the said motor vehicle or attach any other asset. For this reason, he issued a *nulla bona* return.

[2.9] I find it important to refer to what the sheriff states in this *nulla bona* return:

> *"Verder word hiermee gesertifiseer dat daar van RESPONDENT .... betaling en kostes geeis is, ten voldoening van hierdie lasbrief. RESPONDENT het my egter meegedeel dat hy geen geld of*

verhandelbare bates besit om inter alia genoemde lasbrief of gedeelte daarvan te voldoen nie. Geen roerende goederelvervreembare bates is aan my uitgewys of kon deur my gevind word na sorgvuldige soektog en navrae by die gegewe adres nie.

Dus is my relaas een van Nulla Bona"

[2.10] What is of importance therefore, is the fact that to date, this judgment has not been satisfied.

[3] **MAINTENANCE COURT JUDGMENT:**

[3.1] As I have already pointed out, Applicant did obtain against Respondent judgment in the amount of R45,610.00. It is also common cause that this judgment has not been satisfied.

[3.2] What is of further importance is that the very judgment is not and has never been challenged by Respondent. The judgment therefore stands.

[3.3] In this regard Roper J in **Behrman v Sideris and Another 1950 (1) SA 266 (JPD)** expressed himself as follows:

"The ordinary rule, however, is that the judgment stands and must be recognised as valid until it is set aside by the Court ..... I am *obliged, therefore to regard the judgment debt as* a *valid one and the Applicant as having* a *valid claim as* a *judgment creditor* ....."

[4] **ACT OF INSOLVENCY ANO OR ACTUAL INSOLVENCY:**

[4.1] As I have pointed out, the Magistrate Court judgment is valid, and has not been satisfied. According to the sheriff, he was unable to find any assets to satisfy this judgment. It is for this reason that he, on 10 June 2016, issued a *nu/la bona* return. He states specifically in his return of service that Respondent told him he does not have money or any such assets to

satisfy the judgment..

[4.2] Section 8(b) of the Insolvency Act 24 of 1936 *("the Act")* provides as far as is necessary as follows:

> *"A debtor commits an act of insolvency -*
>
> *(a) .....*
>
> *(b) If a court gives judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposal property to satisfy the judgment;*
>
> *(c)* ...
>
> *(d)* ...
>
> *(e)* ...
>
> *(f)* ...
>
> *(g)* ...
>
> *(h)* ..."

[4.3] Mr Jacobsz for the Applicant argued that Respondent has indeed committed an act of insolvency. He based this argument on the fact that the Respondent has failed to satisfy the judgment and also the sheriff's *nulla bona* return dated 13 June 2016.

[4.4] He further argued that over and above the judgment, Respondent admits under oath that he owes Applicant an amount of approximately R183,033

.55, but that he will only be able to make a payment upon receipt from the South African Revenue Services ("SARS"), of his tax refunds.

[4.5] This admission under oath he argues, is itself:

[4.5.1] sufficient proof of Respondent's inability to pay to the Applicant, amount of R183,033.55 he admits owing.

[4.5.2] constitutes another act of insolvency which justifies granting of the provisional sequestration order against Respondent.

[4.6] On behalf of Respondent, Mr Sieberhagen argued that Respondent is not insolvent. He argued that the Applicant's case is merely based on speculation. He argued further that on 12 May 2015, he pointed out to the sheriff movable assets to the value of approximately 'R50,000.00 in satisfaction of the judgment.

[4.7] I have in some detail set out the factual background of this matter, particularly the sheriff's explanation of 13 June 2016.

[4.8] I have also seriously considered all these submissions. What is important and clear to me is that Respondent cannot and is not in a financial position to satisfy the maintenance Court judgment.

[4.9] In addition to that, and on his own version and admission under oath, he cannot and is not in a position to pay the amount of R183,000.00 he admits owing to Applicant.

[4.10] Referring to such a situation, Innes CJ in **De Waardt v Andrew and Thienhaus 1907 TS 727** expressed himself as follows:

> *"Now, when* a *man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him .... Of course; 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; and therefore I always examine in* a *critical spirit the case of* a *man who does not pay what he* owes."
(my underlining).

[4.11] This passage is a direct answer to what is before me in this matter. What is abundantly clear is that Respondent cannot simply pay what he owes. This is so despite his argument that he is solvent. In fact, his argument seems to be that he will eventually pay . In my view, this is just not good enough.

[4.12] Taking into account all of the above, I have no doubt, and am satisfied that Respondent has committed an act of insolvency within the meaning of Section 8 of the Act and that he is insolvent.

[5] **ADVANTAGE TO CREDITORS:**

[5.1] It was argued on behalf of Respondent that sequestration will not be to the advantage of creditors. This argument is based mainly on the fact that since 21 November 2016, Respondent has been placed under debt review in terms of the National Credit Act, 34 of 2005 *("the NCA").*

[5.2] In this regard, counsel for Respondent conceded that only two (2) or three creditors benefit and or receive payments under this arrangement. It is common cause that no payment is made in respect of the maintenance Court judgment and or the amount of R183,000.00- which Respondent admits owing to Applicant as arrear maintenance.

[5.3] In his argument therefore, Respondent seems to suggest that he must first be allowed to pay and settle all of his debt in terms of the debt review arrangements, until all his listed creditors have been paid in full. Once this has been done, only then will he start to make monthly p:ilyments towards all that he owes Applicant in terms of the maintenance order. He is unfortunately not even able to say how long this will take. It is however, clear that such an exercise will take years.

[5.4] As I have pointed, Respondent admits that Applicant is not one of the creditors who receive payments under the debt review arrangements. He does not make any payments whatsoever towards maintenance. According to a document attached to his answering affidavit as Annexure "MVW1", the last payment was made during October of 20·14. This is common cause.

[5.5] Mr Jacobsz, for the Applicant, argued that this is just not good enough. He argued that any arrangement in terms of which Applicant is to be allowed to first pay all other creditors before starting to pay what he owes Respondent, cannot be said to be to the advantage of creditors.

[5.6] He further argued that in terms of the Court order, this amount continues to increase at a monthly rate of approximately R7,000.00. Annexure "MVW1" shows clearly that, the Respondent has been in default and has never made a single payment since November 2014.

[5.7] Taking into account all of these facts, I am satisfied that there is reason to believe that the sequestration will be to the advantage of Respondent's creditors.

[6] **DISCRETION OF THE COURT:**

[6.1] It is so that when considering an application such as this the first consideration by the Court is whether *prima facie* the three *facta probanda* set out in The Insolvency Act have been established. These are:

[6.1.1] Applicant has established against the debtor a liquidated claim of not less than R100.00,

[6.1.2] the debtor has committed an act of insolvency or is insolvent;

[6.1.3] has reasons to believe that it will be to the advantage of creditors of the debtor if the estate is sequestrated.

[6.2] If upon consideration, the court is satisfied that three *facta probanda* have been established, it has the power, but under no obligation to grant

an order of provisional sequestration. In other words therefore, the Court has a discretion. This discretion is to be exercised judicially taking into account all the facts as well as the general history and circumstances of the case.

[6.3] In exercising my discretion, I have carefully considered the facts as well as the history of the matter. I am satisfied that there are no special circumstances and or considerations on the basis which the relief sought should not be granted.

[6.4] That being the case, and in the exercise of my discretion, I am of the view that Applicant is entitled to the order sought. I find no reasons or circumstances to disentitle her of this order.

[7] **CONCLUSION:**

Taking into account all of the above, I am satisfied that Applicant has made out a proper case justifying the granting of the relief sought in that *prima facie:*

[7.1] Applicant· has established against the debtor a liquidated claim of not less than R100.00.

[7.2] Respondent has committed an act of insolvency within the meaning of Section 8(b).

[7.3] There is reason to believe that it will be to the advantage of the debtors creditors if his estate is sequestrated.

[8] **ORDER:**

[8.1] Consequently, I make the following order:

1. The estate of the Respondent is placed under provisional sequestration;
2. The Respondent and any other party who wishes to avoid such an

order being made final are called upon to advance reasons, if any, why the court should not grant a final order of sequestration of the said estate on the 13t h day of August 2018 at 10H00 or so soon thereafter as the matter may be heard.

_____

SS MAAKANE
Acting Judge of the High Court
of South Africa
Gauteng Division
Pretoria

APPEARANCES :

For the Applicant	:	Adv. P S A. J Jacobsz
Instructed by	:	Erasmus Inc. Pretoria
For the Respondent:		Adv. P Sieberhagen
Instructed by	:	Leahy Attorneys Inc. Pretoria