

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



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

2023-05-10

DATE:

SIGNATURE

Case No. 59556/2021

In the sequestration application of:

MACSTEEL SERVICE CENTRES SA (PTY) LTD

Applicant

(Registration no. 2005/016292/07)

and

BREEDT: JANNIE PIETER WILLEM

Respondent

(Id no. [...])

JUDGMENT

The judgment and order are *published and distributed electronically*.

VAN NIEKERK PA, AJ

- [1] On 24 August 2022 a provisional order of sequestration was granted in favour of the Applicant against the Respondent. Respondent filed a Notice of Intention to Oppose and on 13 February 2023 the return date for the provisional order of sequestration was extended to 8 May 2023. The Respondent filed an Opposing Affidavit whereafter the Applicant filed a Supplementary Affidavit in response to a point *in limine* raised by the Respondent in the Opposing Affidavit relating to non-joinder. The Applicant did not file any Replying Affidavit.
- [2] It is common cause that the Applicant obtained judgment against the Respondent in his capacity as surety for Triplicon Construction CC, a Closed Corporation that was placed in liquidation during July 2019. It is further common cause that the Applicant caused a writ of execution to be served on the Respondent pursuant to the aforesaid judgment, on which writ the Sheriff rendered a *nulla bona* return having been advised by the Respondent that he has no executable assets or funds to satisfy the writ. The application for the sequestration of the Respondent is premised on the averment that the Respondent committed an act of insolvency as set out in Section 8(b) of the Insolvency

Act no. 24 of 1936. The *nulla bona* return referred to *supra* was executed on 11 June 2021 and to date the judgment debt has not been satisfied by the Respondent.

- [3] It is common cause that all formalities required in terms of the Insolvency Act and relevant Practice Directives have been complied with by the Applicant for purposes of the relief as claimed in the Notice of Motion namely for an order sequestrating the Respondent.
- [4] In the Respondent's Opposing Affidavit the Respondent raised a point *in limine* of non-joinder, and further take issue with the authority of the deponent of the Founding Affidavit in support of the application for sequestration, avers that the *nulla bona* return is irregular as a result of which the Applicant is barred from relying on the *nulla bona* return as a deed of insolvency, and further denies that the proceedings are to the benefit of the creditors of the estate of the Respondent. I will deal with those issues separately hereunder.

NON JOINDER:

- [5] In the Respondent's Opposing Affidavit the Respondent raised in point *in limine* of non-joinder namely that the Respondent is married in community of property to his wife, avers that divorce proceedings were instituted between himself and his wife and that his wife therefore has an interest in the proceedings and that the failure to join his wife in the proceedings constitutes a defence of non-joinder. In support of these averments, the Respondent attached a copy of a marriage certificate which purports to be a copy of an original marriage certificate evidencing a marriage concluded between the Respondent and his wife on in community of property.

- [6] In response to this point *in limine*, the Applicant's attorney addressed correspondence to the Respondent's attorney of record, attaching a copy of an Antenuptial Contract which was entered into between the Respondent and his present wife during September 2014 and it is further averred that the Applicant's attorney of record established that the Respondent and his present wife were divorced from each other after initially being married in community of property and shortly thereafter remarried out of community of property having entered into the aforesaid Antenuptial Contract. The Respondent's attorney of record was invited to withdraw from the action presumably on the basis that they are now aware that the Respondent allegedly committed perjury, and the Respondent was invited to deal with the aforesaid issues under oath. The Respondent's attorney of record declined to withdraw from the matter and neither did the Respondent file any further affidavits in response to the aforesaid allegations. These allegations made by the Applicant relating to the present marital status of the Respondent are therefore common cause in the papers and wisely the Respondent's counsel abandoned the point *in limine* relating to non-joinder in Heads of Argument filed on behalf of the Respondent.
- [7] *Prima facie* the Respondent committed perjury. The Respondent set out various and detailed allegations pertaining to his alleged marriage to his present wife in order to support the abandoned point *in limine* referred to *supra*, and to this extent attached a copy of recent divorce proceedings purportedly instituted by Respondent against his wife wherein an order for division of the joint estate is claimed in support of the point *in limine*. Respondent further states in his Opposing Affidavit that his wife did not oppose the divorce action to date hereof in the light of the fact that the parties are attempting to settle the matter.

[8] In conclusion on the issue of the non-joinder, I am of the view that there is adequate evidence before me to conclude *prima facie* that the Respondent attempted to commit a fraud upon this Court by committing perjury in support of the point *in limine* raised by the Respondent relating to the defence of non-joinder. I therefore intend to refer the matter to the National Prosecuting Authority for investigation and further steps against the Respondent as deemed necessary by such authority.

DEPONENT'S LACK OF AUTHORITY:

[9] Deponent to the Founding Affidavit attached a copy of a minuted delegation of authority of the Directors of Applicant which reads as follows:

"The following persons are hereby authorised to ... sign any and all documents which may be required to be ... signed by an authorised representative of the (Applicant) in order for the (Applicant) to ... sign and execute all documents necessary and institute any legal action for claims owed to the (Applicant) and generally act for and on behalf of the (Applicant) to recover any amount owing to it:

13.1.1 Josias Renier Blignaut

together with one of the following:

13.1.2 Amanda Lida Bekker;

13.1.3 Hendrieka Salome Dreyer ..."

Ex facie the Minutes of delegated authority five other individuals save and except Josias Renier Blignaut (deponent to the Founding Affidavit) are nominated to do what is necessary in pursuance of the sequestration of the Respondent.

[10] It was submitted on behalf of the Respondent that the aforesaid clause in the delegated minutes implies, with reference to the use of the words “*together with one of the following*” that the deponent to the Founding Affidavit was not empowered to take the necessary steps in pursuance of the sequestration application but had to do so together with any of the other nominated persons in the minuted delegation of authority. In Heads of Argument filed on behalf of Respondent it was further submitted that the minutes of delegated authority clearly requires that the application be launched by the deponent to the Founding Affidavit together with any of the other persons listed in the recorded delegation, and absent such compliance the provisional order stands to be discharged and the Applicant should be ordered to pay the Respondent's costs.

[11] In my view there is no merit in this submission. The minuted delegation of authority clearly authorised a number of persons to be involved in the process, and the preamble to such minuted delegated authority clearly refers to documents “*which may be required to be signed by an authorised representative of the Applicant ...*”. To interpret the minuted delegation of authority to mean that the Founding Affidavit should be deposed to by two different deponents is absurd.

ACT OF INSOLVENCY:

[12] Respondent avers that the Closed Corporation referred to *supra* was placed in liquidation on 8 July 2019 in terms of Section 352 of the Companies Act 61 of 1973. *Ex facie* the papers, the membership interest in such Closed Corporation vests in the Respondent's estate. Respondent proceeds to explain in the Opposing Affidavit that it did not occur to him to inform the Sheriff of his membership in the Closed Corporation at the time when he informed the Sheriff that he does not have the means to satisfy the writ, because he laboured under the wrong impression that due to the fact that the

Closed Corporation were placed in voluntary liquidation, the membership interest therein does not vest in his estate any longer. Respondent further proceeds to state that the writ of execution which rendered a *nulla bona* return is therefore irregular to the knowledge of the Applicant in that there is an asset in the Respondent's estate which may satisfy the execution of the writ. Respondent pertinently states in the Opposing Affidavit that, notwithstanding the liquidation of the Closed Corporation, there are adequate assets in the Closed Corporation which would enable the writ to be satisfied. Clearly the Respondent intends to convey that he is not insolvent and that the assets in the Closed Corporation renders the value of the interest which he holds in the Closed Corporation of such value to be adequate to satisfy the writ and that the Applicant should have been aware of this fact and therefore cannot rely on a "defective" *nulla bona* return.

[13] Significantly, Respondent failed to provide any information on the nature of the assets in the Closed Corporation, gives no indication of what he avers the present value of his membership in the Closed Corporation is, makes no effort to place before the Court financial statements of the Closed Corporation, valuation of assets which vests in the Closed Corporation, on any other evidence of any nature whatsoever in support of the generic averments which the Respondent made in this regard. There is no merit in this defence of the Respondent, and I am of the view that Applicant is entitled to rely on the *nulla bona* return for the relief as claimed against Respondent.

BENEFIT TO CREDITORS:

[14] Applicant has made an averment in the Founding Affidavit that the granting of the sequestration order will be to the benefit of the *concursum creditorum*. Applicant *inter alia* referred to a document which disclosed that the Respondent is the registered owner of at least 7 motor vehicles, and made further averments which I do not deem necessary

to repeat herein, in support of the contention that the application will be to the benefit of the *concursum creditorum*. I am mindful of the fact that it is difficult for an applicant in these circumstances to convince a Court that it will be to the benefit of the creditors, due to the fact that often, such as in this case, the Respondent does not cooperate to provide adequate facts to the Court to consider this issue. These are often also facts that do not fall within the knowledge of the Applicant.

- [15] It was submitted on behalf of the Respondent, that the sequestration of the Respondent would deny him and his creditors the opportunity to generate an income and that it would not be for the benefit of the creditors. In essence the Respondent submits that the Applicant laid no factual basis to justify the submission made in the Founding Affidavit to the extent that upon a proper investigation by a trustee with extensive powers of enquiry, sufficient assets and equity shall be "*unearthed*" in order to provide benefit to creditors.
- [16] Significantly Respondent fails to deal with the averment that there are 7 motor vehicles registered in the name of the Respondent in the sense that the Respondent provides no explanation in the Opposing Affidavit why there are presently 7 vehicles registered in his name whereas he avers that he only has 1 vehicle.
- [17] Considering the evasive manner in which the Respondent dealt with assets in his estate, his lack of candour regarding his financial position and the fact that the Respondent clearly attempted to perpetuate a fraud upon this Court regarding his marital status, I am of the view that it will be to the benefit of creditors that a final order for sequestration be granted against the Respondent which would result in the provisions in terms of the Insolvency Act being employed in order to investigate the insolvent estate for the benefit of creditors.

[18] In conclusion, I can find no reason why the Applicant shall be denied the remedy which it pursues in furtherance of satisfaction of the judgement which it obtained against the Respondent and I therefore make the following order:

1. A final order of sequestration is granted against the Respondent.
2. Costs of the application are costs in the sequestration proceedings
3. The Registrar of this court is directed to forward this judgment to the National Prosecuting Authority for investigation and any further steps to be taken against the Respondent for perjury and/or any other offence committed as a result of the contents of the Respondent's opposing affidavit.

P A VAN NIEKERK AJ.
Acting Judge of the High Court
Gauteng Division, Pretoria

CASE NUMBER: 59556/2021

HEARD ON: 8 May 2023

FOR THE APPLICANT: ADV. C.R. ROUX

INSTRUCTED BY: R C Christie Incorporated

FOR THE RESPONDENT: ADV. R. GOSLETT

INSTRUCTED BY: AC Nothnagel Attorneys

DATE OF JUDGMENT: 10 May 2023