IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 072949-2023
Date of hearing: 29 April 2024
Date delivered: 15 May 2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

15/5/24 [redacted]
DATE SIGNATURE

In the matter of:

NEDBANK LTD **Applicant**

and

MASIZA MASIZA **Respondent**

JUDGMENT

SWANEPOEL J:

[1] The applicant seeks to place the respondent under provisional sequestration. The applicant is a creditor of the respondent by virtue of a deed of settlement dated 18 October 2010, in terms of which the respondent acknowledged his indebtedness to the applicant, together with Unkonka Security Services and Consultancy (KZN) (Pty) Ltd ("Unkonka"), a company of which the respondent was then a director. The deed of settlement was made an order of court on 1 April 2011.

[2] Unkonka was wound up finally on 8 June 2015. Pursuant to the winding up, the company liquidators sold an immovable property belonging to the company, from which sale the applicant received a dividend. The applicant says that as at 8 September 2016, after the deduction of the amount received pursuant to the sale of the property, the sum of R 2 518 037.56 was still due to it.

[3] The sale of the immovable property was conducted by public auction. A company of which the respondent was then a director, Masiza Capital (Pty) Ltd ("Masiza") made a successful bid for the property at a purchase price of R 2 380 000, excluding VAT. The purchase was apparently funded through a loan by one Gerhard Bester. When Masiza was unable to repay the loan, the property was sold to one Claasen at a purchase price of R 2 200 000. The respondent remained a director of Masiza until 2023 when he resigned. He is still employed by Masiza, allegedly as a Business Development Manager.

[4] On 28 September 2016 a writ of execution was served at the respondent's home. No assets could be attached. On 24 November 2016 the applicant launched an application for the respondent's sequestration. The respondent raised the defence that the order of court had become superannuated. The argument was upheld and the application was dismissed. The order was later revived by an order granted on 29 April 2019. A new writ of execution was issued on 3 October 2019. On 16 October 2019 the writ could not be executed as the Sheriff was not able to obtain access to the respondent's property, and it could not be

confirmed that the respondent resided at the given address, namely 332 Lynda Place, Waterkloof, Pretoria.

[5] The property is registered in the name of Olova Technologies (Pty) Ltd ("Olova"), a company of which the respondent was a director from 1 June 2008 to 1 October 2021, when he resigned. It is common cause that although the respondent has resigned as a director of Olova, he is still residing at the Waterkloof property.

[6] On 27 January 2020 the applicant again tried to execute the writ, and this time an attachment could not be made at the Waterkloof address. No access could be obtained to the property and the respondent could not be found. On 28 July 2020 the writ could again not be executed as one Nokubonga Sodlulashe alleged that that he was renting the property from the respondent. A copy of the writ was served on Sodlulashe in the respondent's temporary absence. No movable property belonging to the respondent could be found.

[7] On 7 February 2022 the Sheriff obtained the assistance of the respondent's neighbour to open the house. The Sheriff recorded that the house was almost empty, and that there was obviously only one person living in the house as there was only one bed in a bedroom. In a conversation between the respondent and the Sheriff the respondent alleged that the house did not belong to him, but he did not divulge the name of the owner. The respondent also said that the house was being renovated.

[8] A few minor movables were attached, and a silver BMW motor vehicle. During the aforesaid conversation the respondent said that the vehicle belonged to his son. The respondent's son then launched an interpleader alleging that all the attached goods belonged to him, and that he was storing them at the respondent's home. The attachment was uplifted.

[9] An attempt was then made to attach the respondent's shareholding in Olova. On 11 May 2021 the Sheriff rendered a return which stated that the writ was being returned as the defendant could not

be found at the Waterkloof address. The Sheriff also sought information on the alleged shareholding, and he asked where the share certificates could be found. Ultimately the Sheriff refused to execute the writ because he did not have proof that the shares were indeed held by the respondent. Enquiries to the auditors of Olova as reflected on a CIPC search were fruitless. The auditors denied that they had been appointed as auditors of Olova, and they had no knowledge of the existence of a share register for the company.

[10] In short, the applicant has made a number of attempts to recover the monies owed to it. A vehicle search shows that the respondent is linked to two vehicles, a Land Rover L320 SP and a Suzuki. None of the attempts at attachment of property bore any success, and a Deeds Office search has revealed that the respondent owns no immovable property.

[11] The applicant alleged that the respondent is an active director or member of eleven different companies or close corporations. He had also been linked to a number of other companies or close corporations, but had resigned as director or member.

[12] The respondent says that he indeed resides at 332 Lynda Place, Waterkloof, the property belonging to Olova, and which address is in fact Olova and Masiza's registered address. Although the respondent alleges that he is not a shareholder in Olova, he does not say who the shareholders are. He does not explain what the basis is of his occupation of a property that belongs to Olova. The respondent alleges that he is a Business Development manager for Masiza. He does not explain why he resigned as a director of the latter company. He alleges that he earns approximately R 50 000 per month in commission, but he does not provide any evidence to support his allegation.

[13] Under section 10 of the Insolvency Act, 24 of 1936 ("the Insolvency Act") a provisional sequestration order may be granted if the petitioning creditor has established that it has a claim in excess of £ 50 against the

respondent, that the respondent has committed an act of insolvency or is factually insolvent, and if there is reason to believe that it would be to the advantage of creditors if his estate is sequestrated.

[14] The applicant has produced a certificate of balance that reflects the outstanding debt as being R 4 084 511.64 as at 3 July 2023. In terms of clause 4.1 of the deed of settlement, the certificate of balance is *prima facie* evidence of the contents thereof. The certificate of balance was also accompanied by a statement of account for the period April 2009 to July 2023.

[15] The respondent has attacked the correctness of the certificate without providing any factual basis for his challenge. The averment that the certificate is incorrect must be rejected. There is no real dispute that the applicant is a creditor of the respondent and that it has *locus standi* to bring this application.

[16] The respondent denies that he is factually insolvent, but he does not deny the indebtedness (save to admit the extent thereof), and he does not deny that he has been unable to satisfy any of the writs issued by the applicant. The respondent says that all of the movable property at 332 Lynda Road belongs to his son, but he does not say what his assets are, and where they may be found.

[17] Furthermore, the respondent says that all of the companies in which he has an interest are dormant and do not actively trade. In support of that contention, the respondent has provided a letter by "my" auditors (as he termed the auditors), Khumalo & Mabuya. The letter records that the auditing firm was appointed by Masiza Masiza, and it confirms that all of the entities in which the respondent held a directorship have been either deregistered or are dormant. The letter is not confirmed in a confirmatory affidavit, and its evidentiary value is questionable.

Respondent says he does not own shares in either Olova or Masiza, the latter allegedly being the only company still trading.

[18] The respondent's denial that he is factually insolvent cannot exist alongside the respondent's averment that he only owns an old Land Rover which he purchased in cash. He denies owning any shares in any of the many companies with which he is linked. He says that all of the movable property that was found at his home belongs to his son. The respondent's averment that he is not factually insolvent is belied by the facts. In my view the applicant has made out a proper case that the respondent is factually insolvent. Once that fact has been established by inference, then the respondent attracts an evidentiary burden to rebut the inference drawn. The respondent has been extremely evasive regarding his financial affairs, and specifically regarding his relationship with Olova (in whose house he resides) and Masiza, in which he relinquished his directorship to take up the role of an employee. Not only has the respondent not rebutted the inference that he is insolvent, it seems to me that on the respondent's own version, he is clearly factually insolvent.

[19] Finally, the respondent says that it would not be to his creditors' advantage were he to be sequestrated. In arms-length sequestrations, such as this, an applicant would seldom have intimate knowledge of a respondent's assets and liabilities, and it would often be impossible to calculate mathematically whether there will be an advantage to creditors. Under section 10 of the Insolvency Act, this Court only has to find on a *prima facie* basis that there is reason to believe that the sequestration of the respondent's estate would be to the advantage of creditors in order to grant a provisional sequestration order.

[20] The applicant has argued that the advantage to creditors in this case lies in the power of trustees to investigate the respondent's finanacial affairs. In *Awerbuch, Brown & Co v Le Grange*[1] it was

[1] 1939 OPD 20

suggested that the power of a trustee to investigate the insolvent in itself constitutes an advantage to creditors. However, in *Meskin & Co v Friedman*[2] the Court said:

> "The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. In my opinion the 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."

[21] In *London Estates (Pty) Ltd v Nair*[3] the test was formulated as follows:

> "Facts indicative of a prospect which is not too remote, that some pecuniary benefit will result to the creditors, may include the fact that a substantial estate exists (cf. Hill & Co. and Others v Gane, 1925 CPD 242 at 245). If no substantial estate is shown to exist, circumstances may yet establish a reasonable prospect, a prospect that is not too remote, that concealed assets will be found or others recovered."

[22] In this matter there are a number of unexplained issues. Firstly, upon the winding up of Unkonka, a company of which the respondent had been a long-standing director, the respondent devised a plan to retain Unkonka's property by purchasing the property on the name of Masiza. The loan which funded the deal, which was advanced by an individual for R 2 380 000 was in itself unusual and is not explained by the respondent.

[23] Secondly, the home in which the respondent resides was purchased by Morula Communications (now Olova) in 2007 at a purchase price of R 3 000 000. The relationship between the respondent and Olova

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[2] 1948 (2) SA 555 (W) at 559
[3] 1957 (3) SA 591 (D)

is unexplained. He was a director of the company until 1 October 2021, when he resigned. The respondent does not explain why he resigned as director of Olova. He denies that he is a shareholder of the company, but he does not say who the shareholders might be. If it were so that the respondent has no interest in Olova, then why would Olova allow the respondent to reside in its property? Does the respondent pay rent for the use of the property or is the property at his disposal free of charge? If the latter is the case, then why would Olova allow the respondent to reside there free of charge? Strangely, on 29 October 2021 certain changes to Olova's details were registered with the CIPC. The respondent's resignation as director was registered, but at the same time Olova's business address was changed to 332 Lynda Place Waterkloof, and the email address was changed to MMasiza@yahoo.co.uk. One Olwethu Uviwe Masiza was added as a director of the company, as was Nokubonga Sodlulashe. One wonders why, when the respondent had just resigned as a director, his address would suddenly reflect as Olova's business address, and why 332 Lynda Place address would remain the company's registered address after his resignation?

[24] Thirdly, the respondent is silent on his employment with Masiza. He resigned as a director on 9 March 2023, and he took up a position as a manager. Allegedly, he does not share in the profits of the company, receiving only commissions. The respondent did not explain why he would resign as director of a company of which he had been the sole director for some seven years, and allow two new directors to be appointed, one on exactly the same date as respondent's resignation, and one six days later. One wonders what the rationale might have been for such a transaction? Moreover, if the respondent is only a manager in the company, then why is his residential address the registered address of the company? Furthermore, in denying that he is a shareholder in Masiza, one would have expected the respondent to say who the shareholders in fact are.

[25] The respondent has reported to the Sheriff that the immovable property found in his home belongs to his son. Where then are the respondent's household effects? The respondent says that he only earns R 50 000 on average per month and that his expenses account for all of that income. How then, did the respondent manage to pay R 72 600 in cash for a motor vehicle on 10 March 2022 when he purchased the Land Rover from We Buy Cars (Pty) Ltd?

[26] The respondent has made a bald allegation regarding his income. Had the respondent been truthful, one would have expected him to provide proof of his income and of his expenses. The fact that he has not done so, and that he has been so secretive in explaining his financial affairs gives one pause for thought. A further concern is that although the respondent alleges that the companies in which he holds active directorships are dormant or deregistered, that allegation is not bolstered by any facts. One questions why the companies have become dormant and when that happened?

[27] I have gained the distinct impression that the respondent has not played open cards with the Court, and that he has been trying to obfuscate. He has not been a man of few means; he has been an entrepreneur for many years and a director of many companies. His plea of poverty is difficult to swallow. In my view there is sufficient evidence from which one can find that there is, *prima facie,* a likelihood that an investigation may uncover hidden assets or additional income from which the debt may be settled.

[28] In the circumstances I make the following order:

> **[28.1] The estate of the respondent is placed under provisional sequestration in the hands of the Master of the High Court.**

[28.2] The respondent, and any person having an interest in the matter, may show cause at 10h00 on 3 July 2024 why this order should not be made final.

[28.3] This order shall be published once in the Government Gazette and in the Citizen newspaper.

[28.4] Costs shall be costs in the sequestration.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR THE APPLICANT:	**Adv. M.P. Van der Merwe SC**
ATTORNEY FOR THE APPLICANT:	**Weavind & Weavind**
COUNSEL FOR THE RESPONDENT:	**Adv R. Bouwer**
ATTORNEY FOR RESPONDENT:	**Leslie Cohen & Associates**
DATE HEARD:	**29 April 2024**
DATE OF JUDGMENT:	**15 May 2024**