REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 1603/2012

In the matter between:

NOMVULA EFFIE CHILIZA Applicant

and

ASHENDRAN GOVENDER First Respondent

INTEGER MORTGAGE Second Respondent

JUDGMENT

Delivered on 29 April 2013

Vahed J:

[1] An urgent application moved on 17 February 2012, on proper and adequate notice by service of the papers upon the applicant, brought about the provisional sequestration of the estate of the applicant, that very day, at the instance of the first respondent. At the time, and prior to the provisional Order being obtained, the application papers ("the petition") were also delivered by hand to the South African Revenue Service ("SARS"). After the second respondent had intervened in the application, and on the extended return day of the provisional Order on 9 July 2012, the Court (*Nkosi J*) granted an Order finally sequestrating the estate of the applicant.

[2] In the present application, commenced on 23 July 2012, the applicant seeks to rescind the final sequestration Order. She does so on the simple ground that when the Final Order was granted, the Provisional Order had not by then been served on SARS as required by Section 11(2A)(c) of the Insolvency Act, 24 of 1936 ("the Act"). The application for rescission is opposed by the second respondent.

[3] It is common cause that when the Final Order was granted the Provisional Order had not by then been served on SARS. What is in dispute is whether that served as an absolute bar to the grant of the Final Order.

[4] The history and background detail is important for a proper consideration of the matter.

[5] The sequestration application was brought in obviously very friendly circumstances. The petition reveals the following:

a. The first respondent (as applicant in the petition) simply describes himself as a *businessman* without further detail being disclosed.

b. The applicant (as the respondent in the petition) is described as an adult female with the particulars of her identity number, date of birth and residential address being furnished. No details as to her occupation are revealed.

c. Then the applicant is said to have been indebted to the first respondent in an amount of R517 130,00, which amount was alleged to have been given to her in a series of payments, apparent proof of which is put up in the form of mainly internet transfer *print outs* made principally to either *Serendipity Travel* or *bbb travel* in varying amounts spanning the period 20 July 2011 to 7 September 2011. There is no explanation of the relationship between the applicant and these two entities. In addition, the first respondent put up an acknowledgement of debt in which the applicant admitted her indebtedness to the first respondent in that sum. That document is dated 21 September 2011 and contained an undertaking to repay the amount in full on or before 30 October 2011.

d. The petition does not disclose the reasons for the various advances and neither does the first respondent indicate why he chose to make those loans without any security for their repayment being furnished to him.

e. The first respondent does not disclose what he did when the monies were not repaid on 30 October 2011. His affidavit (deposed to on 16 February 2012) simply records that he received a letter dated 1 December 2011 from the applicant. It is put up. The letter is typewritten on blank A4 sized paper and uses a typescript and style reminiscent of the typescript and style of that contained in the acknowledgement of debt (for example the dates on both documents use the identical form of superscript).

f. The letter discloses that the applicant had promised repayment on 15 November 2011. No mention of this is made in the petition or of what interactions had taken place. Concluding with an apology and an indication of inability to pay (perhaps temporarily), the letter barely passes muster for the purposes of section 8(g) of the Act.

g. The first respondent then discloses that enquiries made of the applicant have revealed that "…she is in dire financial straits…". Her immovable property was to be sold in execution at the instance of the second respondent on 20 February 2012 and she furnished the first respondent with a copy of the Notice of Sale. The first respondent does not disclose when all of this took place.

h. The petition was hand delivered to the first respondent and to SARS on 16 February 2012. According to the Court File and the Order made, neither appeared at Court on 17 February 2012. The petition was also served on the second respondent on 17 February 2012. In the affidavit delivered on its behalf when it intervened the second respondent disclosed that it "…intended to oppose the Application however before Counsel could be instructed to attend Court, the Provisional Order was granted".

[6] In her replying affidavit the applicant states that she did indeed attend at Court on 17 February 2012 and that she consented to the Provisional Order being made. As I have indicated above, this is not recorded anywhere. In addition, she denies that the sequestration was a *friendly* one. Given what I

have set out above, that denial is patently false. However, nothing turns on that score.

[7] The applicant goes on to say that between the dates of the provisional and final Orders she had obtained a purchaser for her immovable property and wanted to oppose the final Order on the basis that a sale of the property by private treaty would have resulted in the debt to the second respondent being discharged in full. She said nothing about the debt to the applicant which, on the papers as they then stood, remained one that appeared to be valid and due.

[8] Thus, in my view, the only issue before me is whether *Nkosi* J was precluded from granting the Final Order of sequestration because the Provisional Order had not, by then, been delivered to SARS.

[9] Section 11(2A)(c) of the Act says that a "…copy of the rule *nisi* must be served on … the South African Revenue Service".

[10] The question that arises is whether in employing the word *must* in section 11(2A)(c) the legislature intended the provision to be peremptory. That immediately brings to the fore a consideration of the provisions of section 9(4A) of the Act. They read as follows:

'(4A) (*a*) When a petition is presented to the court, the petitioner must furnish a copy of the petition—

(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(ii) to the employees themselves—

(*aa*) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(*bb*) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii) to the South African Revenue Service; and

(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.

(*b*) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (*a*) was complied with.'

[11] In *Standard Bank of SA Ltd v Sewpersadh & Ano* 2005 (4) SA 148 (C) at para 14 the provisions of section 9(4A) were held to be peremptory. However, in *Hannover Reinsurance Group Africa (Pty) Ltd & Ano v Gungudoo & Ano* 2012 (1) SA 125 (GSJ) the provisions were held to be directory. Both those decisions concerned the application of section 9(4A)(i) & (ii); ie the provisions relating to service on a respondent's employees. Both *Sewpersadh* and *Gungudoo* concerned the sequestration of a private individual and in both matters the founding papers were not served on the respondent's employees. In *Sewpersadh* it was common cause that the respondent had employees while in *Gungudoo* the applicant was not aware of any employees, that being reinforced by the fact that the respondent had, shortly prior to the commencement of proceedings, been in the employ of the applicant.

[12] The difference in approach between *Sewpersadh* and *Gungudoo* is perfectly rational and understandable. The difference, in my respectful view, demonstrates that an interpretation as to whether the provisions of section 9(4A) of the Act are peremptory can only be made on a case by case basis, depending of the facts of each particular case.

[13] I pause to mention that on appeal in *Gungudoo & Ano v Hannover Reinsurance Group Africa (Pty) Ltd & Ano* 2012 (6) SA 537 (SCA) it was held that the provisions relating to service of the petition on a debtor's employees related only to business employees. The question as to whether the provision was peremptory or directory was left open.

[14] How then is one to interpret the provisions of section 11(2A)(c)? Are they peremptory?

[15] In *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H to 434E the following was said:

'Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have

the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 587A - C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence (see, for example, *Sutter v Scheepers* 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327 *in* fin - 328B and *Shalala's* case *supra* at 587F - 588H, and cf *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C - E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see, for example, *Rondalia Versekeringskorporasie Bpk v Lemmer* 1966 (2) SA 245 (A) at 257H - 258H).'

[16] In *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) *OLIVIER* JA said the following at para 13:

'It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori*, not *a priori* significance. The approach described above, identified as '. . . a trend in interpretation

away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138D - E, seems to be the correct one and does away with debates of secondary importance only.'

[17] Again, in *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) it was held (at para 22) that "…even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved".

[18] More recently, in *Mthimkhulu v S* [2012] ZASCA 53 (4 April 2013) it was held as follows:

'[9] In *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) Ogilvie Thompson JA said:

"Even where the language is unambiguous, the purpose of the Act and other contextual considerations may be invoked in aid of a proper construction."

And in *Venter v R* 1907 TS 910 at 914-5 Innes CJ expressed himself in these terms:

"It appears to me that the principle we should adopt may be expressed somewhat in this way – that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could lead to a result contrary to the intention of the Legislature, as shown by the context or by such other consideration as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature."

This approach entails that one may:

"(i) look at the preamble of the Act or other express indications in the Act as to the object that has to be achieved;

(ii) study the various sections wherein the purpose may be found;

(iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);

(iv) draw logical inference from the context of the enactment." (*footnotes omitted*)

[10] Recently, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, this court, after an in-depth analysis of the authorities relating to the interpretation of documents stated:

". . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument . . . having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. . . . consideration must be given to the language used in the light of the rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is diverted and the material known to those responsible for its production. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

. . .

The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." '

[19] In applying those authorities to the facts and circumstances of the present matter it seems to me that section 11(2A)(c) calls for a treatment different to that implied by section 9(4A).

[20] There is one striking difference between section 9(4A) and section 11(2A) of the Act. It is this: when a Court considers a petition, and before granting a provisional Order of sequestration, there must be placed before it an affidavit which sets out the manner in which the provisions of the section have been complied with (section 9(4A)(b)). Section 11(2A) of the Act does not contain a similar provision. In addition, section 12 of the Act is also instructive:

'12 Final sequestration or dismissal of petition for sequestration

(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that-

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.'

[21] Both section 9(4A) and section 11(2A) were introduced into the Act by amendment in 2002 (Act 69 of 2002). When effecting those amendments the legislature left section 12 of the Act in its original form.

[22] The purpose of bringing the provisional sequestration of a debtor's estate to the attention of SARS seems reasonably clear. It serves to provide SARS with an opportunity to intervene, if it so chooses, so as to bring certain relevant facts to the Court's attention or to ensure that a final Order does in fact eventuate. It seems to me that that object is substantially achieved by service of the petition.

[23] In my view therefore, while service of the petition on SARS is peremptory, the requirement of further service of the Provisional Order is not. That conclusion, in my view, resonates with the authorities referred to above and with the observation that section 12 of the Act does not oblige a Court to take the non-service of the Provisional Order into account when exercising its discretion whether to grant a final Order.

[24] It needs to be stated however that on the given facts of a particular case a Court remains at liberty, in the exercise of its discretion, and *ex abundanti cautela*, to insist upon service of the Provisional Order upon SARS before granting a Final Sequestration Order. In practice therefore, it would be salutary for petitioners for the sequestration of a debtor's estate to effect service of the Provisional Order upon SARS before seeking a final Order. This would obviate the unnecessary delay and additional costs that would ensue if a Court were to subsequently insist upon such service being effected.

[25] For those reasons and for present purposes I hold that the failure to serve the Provisional Order upon SARS was not fatal and did not preclude *Nkosi* J from granting the Order finally sequestrating the estate of the Applicant.

[26] The application is dismissed with costs.

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Vahed J

CASE INFORMATION

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Date of Judgment:	29 April 2013
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