THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20837/14

In the matter between:

NOMVULA EFFIE CHILIZA **APPELLANT**

and

ASHENDRAN GOVENDER **FIRST RESPONDENT**

INTEGER MORTGAGE SPV (PTY) LTD **SECOND RESPONDENT**

Neutral Citation: *Chiliza v Govender* (20837/14) [2016] ZASCA 47 (31 March 2016)

Coram: Tshiqi, Pillay, Swain and Dambuza JJA and Tsoka AJA

Heard: 4 March 2016

Delivered: 31 March 2016

Summary: Interpretation – sections 9(4A) and 11(2A)*(c)* of the Insolvency Act 24 of 1936 – couched in peremptory terms – failure to furnish petition and – failure to serve provisional order on the South African Revenue Service constitutes non-compliance – petition furnished but provisional order not served on SARS – final order of sequestration set aside.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Kruger, Seegobin and Mbatha JJ sitting as a court of appeal):

1. The appeal is upheld with no order as to costs.
2. The order of the full court is set aside and replaced with the following:

'(a) The appeal is upheld with no order as to costs.

(b) The order of the KwaZulu-Natal Local Division, Durban (Vahed J) is set aside and replaced with the following:

"(i) The final order of sequestration granted on 9 July 2012 is set aside.

(ii) The estate of the respondent, Nomvula Effie Chiliza (ID 760319 0263 081) (date of birth 19 March 1976) is placed under provisional sequestration in the hands of the Master of the High Court.

(iii) A rule nisi is issued calling upon the respondent and all interested persons to show cause, if any, to this Honourable Court on 4 May 2016 at 9h30, or so soon thereafter as the matter may be heard, why the estate of the applicant should not be finally sequestrated."'

JUDGMENT

Tshiqi JA (Pillay, Swain and Dambuza JJA and Tsoka AJA concurring)

[1] The issue in this appeal is whether the failure to serve a provisional sequestration order, on the South African Revenue Service (SARS) in terms of s 11(2A)*(c)* of the Insolvency Act 24 of 1936 (the Act), is an absolute bar to the grant of a final order of sequestration.

[2] On 17 February 2012, the first respondent, Mr Ashendran Govender, sought and obtained a provisional order of sequestration on an urgent basis in the KwaZulu-

Natal Local Division, Durban (the high court) against the appellant, Ms Nomvula Chiliza, returnable on 15 March 2012. A copy of the petition was served on SARS on 16 February 2012 in compliance with the provisions of s 9(4A) of the Act.[1] It was also served on the second respondent, Integer Mortgage SPV (Pty) Ltd, on 17 February 2012, shortly before the application was heard in court. On 15 March, the second respondent gave notice of its intention to intervene as a creditor in the matter and the sequestration application was accordingly adjourned for that purpose. The second respondent reconsidered its position and on 9 July 2012 a final order of sequestration was granted.

[3] On 19 July 2012 the appellant launched an application for the rescission of the final order on the basis that the provisional order of sequestration was not served on SARS as contemplated in terms of s 11(2A)*(c)* of the Act.

[4] Section 11(2A) of the Act provides:

'A copy of the rule nisi *must be served* on

(a) Any trade union referred to in subsection (4)

(b) The debtor's employees by affixing a copy of the petition to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, 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; and

(c) The South African Revenue Service.' (My emphasis.)

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[1] Section 9(4A) of the Act provides:

'*(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 Services; 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.'

[5] It is common cause that the provisional order was not served on SARS. The issue before the high court was whether the final order stood to be rescinded for that reason. The high court (per Vahed J), in a judgment reported *sub nom*: *Chiliza v Govender & another* 2013 (4) SA 600 (KZD), compared the provisions of s 11(2A) with those of ss 9(4A) and 12 and reasoned (para 20):

'There is a striking difference between s 9(4A) and s 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 (s 9(4A)*(b)*). Section 11(2A) of the Act does not contain a similar provision.'

And it went on to observe that (para 23):

'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.'

It then concluded that the failure to serve the provisional order upon SARS was not fatal and did not preclude the granting of a final order sequestrating the estate of the appellant.

[6] An appeal to the full court of the KwaZulu-Natal Division, Pietermaritzburg was dismissed and that court endorsed the reasoning of Vahed J, and said (para 13):

'. . . failure to serve the provisional order on SARS, in terms of s 11(2A)*(c)*, would not preclude the grant of a final order of sequestration order.'

And it went on to say the following in para 14:

'This view is reinforced or supported by the provisions of s 9(4A)*(b)* which requires an affidavit to be filed, before or during the hearing, setting out the manner in which service on the trade unions, employees and the SARS was effected. Absent this affidavit, a court, in my opinion, is precluded from granting the provisional order of sequestration. The Legislature however did not deem it necessary to amend s 11 in a similar fashion and the requirements for the grant of a final order of sequestration are set out in s 12 and remain unchanged.'

The court concluded that failure to serve the provisional order on SARS, in terms of s 11(2A)*(c)* would not preclude the grant of a final sequestration order.

[7] The present appeal is with the leave of this court. The first respondent is not a party to the appeal and the second respondent has filed a notice to abide by the decision of the court.

[8] The provisions of s 11(2A) are couched in peremptory terms. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 582 SCA para 18 this court stated:

'Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all those factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that that leads to insensible or unbusiness like 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.'[2] (Footnote omitted.)

[9] The reasoning adopted by Vahed J and subsequently endorsed by the full court disregards the clear language used in the statute. Whilst it is correct that ss 9(4A)*(b)* and 11(2A) deal with the manner in which the parties listed in those sections should be notified of the impending sequestration proceedings, the requirement in s 9(4A)*(b)* that an affidavit should be filed, does not change the peremptory nature of the language used. As the Act states, its purpose is to inform the court about the manner in which the petition was 'furnished' to the listed parties. However, whilst s 9(4)*(a)* requires the petitioner to 'furnish' a copy of the petition, s 11(2A) requires a copy of the rule nisi to be 'served' on the listed parties. In *Stratford & others v Investec Bank Ltd & others*,[3] the Constitutional Court said of the different terminology employed in those provisions (para 40):

'The fact that "furnish" is used in s 9(4A) and the word "serve" is used in s 11(2A) of the Insolvency Act indicates that the legislation envisaged a lower threshold for notifying the employees than service in respect of s 11(2A). I am of the view that "furnish" requires that

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[3] *Stratford & others v Investec Bank Ltd & others* [2014] ZACC 38; 2015 (3) SA 1 (CC). See also *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* [2013] ZASCA 167; 2015 (2) SA 526 (SCA).

petitions “must be made available in a manner reasonably likely to make them accessible to the employees”.’ (Footnotes omitted.)

[10] The fact that a copy of the petition only has to be ‘furnished’ to SARS has no bearing on the peremptory nature of this requirement. In *Gungadoo & another v Hannover Reinsurance Group Africa (Pty) Ltd & another* [2012] ZASCA 83 2012 (6) SA 537 (SCA) this court left open the question whether s 9(4A) was peremptory. However in *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2013] ZASCA 167; 2014 (1) All SA 294 (SCA) this court in dealing with the provisions of s 346(4A) of the old Companies Act (which are almost identical to s 9(4A) of the Act) held that compliance with the section was peremptory.[4] Similarly in the present case, the requirement that the petition be furnished to SARS is peremptory.

[11] In view of the fact that the word “furnish” is expansive and encompasses several forms of notification which may not entail personal service, it seems to me that the Act prescribed the filing of an affidavit as the most effective way to satisfy a court that the petition has been ‘made available in a manner reasonably likely to make it accessible’ to the listed parties. It is not surprising that s 11(2A) does not contain a similar requirement because the term “serve” usually denotes personal service or “legally delivered, i.e. delivered in accordance with the law so as to notify the person on whom it is served of its contents”[5] or “bestel; oorhanding”[6] to the party itself or its representative and is usually easy to prove through a return of service, a stamp or a signature of the recipient. It is only in rare circumstances, usually when proof of service is not apparent on the face of the document that a court would require an affidavit to prove service. The import of the requirement of an affidavit in s 9(4A) therefore is to provide conclusive proof of compliance with the provisions of the Act and the fact that s 11(2A) does not require an affidavit to be filed, whilst s 9(4A)*(b)* does, has no bearing on the peremptory nature of the two provisions.

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[4] *EB Steam* dealt with the furnishing of the application to employees and held that although compliance with the section was peremptory, the method in which a creditor did so, was directory.
[5] *S v Watson 1969 (3) SA 405 (A) at 410B*
[6] *Botha NO v Botha 1965 (3) SA 128 (E)* at 130F; *Odendaalsrus Munisipaliteit v Odendaalsrus Gold, General Investment & Extension Ltd* 1958 (3) SA 111 (O) at 114E; *Mouritzen v Greystones Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD) AT 86C;

[12] The court also compared s 11(2A) with s 12. Section 12 deals with factors to be taken into account before the court grants a final order of sequestration and thus deals with the substance of the application and not the procedural requirements. However, it does not set out an exhaustive list of all the relevant factors and the fact that it does not explicitly state that the court should take into account the non-service of a provisional order of sequestration when it exercises its discretion whether to grant a final order does not alter the peremptory nature of s 11(2A). The only relevant connection between s 11(2A) and its interpretation to s 12 is that s 12 requires the court to consider as one of the factors, whether it is to the advantage of the creditors that a final order of sequestration should be granted. Whether a provisional order was served on SARS, which is a preferential creditor in terms of the Act,[7] must be one of those factors. This must be so because any tax for which the insolvent was liable under any Act of Parliament or Ordinance of a Provincial Council in respect of any period prior to the date of sequestration of the estate is due. And if a provisional order of an impending sequestration is not served on SARS, there is a risk that any amounts due to the public purse would remain uncollected.

[13] For all those reasons the appeal must succeed. I therefore make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the full court is set aside and replaced with the following:

‘(a) The appeal is upheld with no order as to costs.

(b) The order of the KwaZulu-Natal Local Division, Durban (Vahed J) is set aside and replaced with the following:

> “(i) The final order of sequestration granted on 9 July 2012 is set aside.
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> (ii) The estate of the respondent, Nomvula Effie Chiliza (ID 760319 0263 081) (date of birth 19 March 1976) is placed under provisional sequestration in the hands of the Master of the High Court.
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> (iii) A rule nisi is issued calling upon the respondent and all interested persons to show cause, if any, to this Honourable Court on 4 May 2016 at 9h30, or so soon thereafter as the matter may be heard, why the estate of the applicant should not be finally sequestrated.”’

[7] Section 101 of the Act.

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ZLL Tshiqi

Judge of Appeal

APPEARANCES

For Appellant:	V Sitaram
Instructed by:	K. Durai & Associates, Durban
	Honey Attorneys, Bloemfontein
For First Respondent:	No appearance
Instructed by:	CKMG Attorneys, Verulam