

be preferred above the present creditor. It seems to me a clear case in which the debtor is not entitled to the benefit of the Moratorium Act.

Appellant's Attorneys: *Reitz & Pienaar*; Respondents' Attorneys: *Neser & Hopley*.

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GAFOOR v. RAJACK.

1915. October 6. WESSELS and CURLEWIS, JJ.

*Landlord and tenant.—Ejectment.—Action for recovery of rent.—No property found.—Proclamation 21 of 1902, sec. 25.*

In an action for recovery of rent and for ejectment under sec. 25 of the Magistrate's Court Proclamation the summons alleged that the defendant had no property on the premises let or elsewhere against which execution could be levied. The only evidence led was to the effect that the defendant had no property on the premises. *Held*, on appeal, that in the absence of proof that the defendant had no property on the premises or elsewhere the magistrate could not grant an order for ejectment under the section.

Appeal from a decision of the A.R.M., Johannesburg.

The appellant sued the respondent for rent due in respect of certain premises, and the summons contained the allegation that "the defendant has no property or goods on the premises let nor has he any other property or goods within the knowledge of the plaintiff from which, by execution, could be obtained payment of the rent due and the costs of execution." The summons claimed an order of ejectment under sec. 25 of the Magistrate's Court Proclamation. The defendant was in default.

The only evidence before the Court was that of the plaintiff, who said: "Defendant has no property or goods on the premises."

The magistrate refused an order for ejectment on the ground that the evidence of the plaintiff was not sufficient to comply with the provisions of sec. 25 of the Proclamation. The plaintiff appealed.

*A. Davis*, for the appellant: The object of sec. 25 of the Magistrate's Court Proclamation is to obviate the necessity of a further appearance in Court in terms of sec. 23 of the Proclamation. The summons alleges that the defendant has no property anywhere, and

that allegation was not denied. It is difficult for a plaintiff to give evidence to prove a negative.

No appearance for the respondent.

WESSELS, J.: The appellant, plaintiff in the Court below, sued the respondent for rent of certain premises, and added: "The defendant has no property or goods on the premises let, nor has he any other property or goods, within the knowledge of the plaintiff, from which by execution could be obtained payment of the rent due and the costs of execution." The defendant was in default in the Court below. The plaintiff swore that the defendant owed him £4 10s. rent, and had no property or goods on the premises. This was the only evidence led. On the strength of this the plaintiff claims to be entitled to get judgment for the rent due, and also judgment under sec. 25 of the Magistrates' Court Proclamation, 21 of 1902, for ejection. He contended before the magistrate that this section means that if it should appear to the Court that there is no property to be found upon the premises of the lessee against which to execute any process of execution the Court could give an order of ejection. The magistrate came to the conclusion that he could not act under section 25, because he could not read into the section, after the words "to be found", the words "on the premises". He held that the section meant exactly what it says—that if the plaintiff can prove that the defendant had no goods whatever, either from the defendant's own admission or by some other means, and can satisfy the Court to that effect, the Court could give an ejection order under section 25. The Proclamation also provides, in section 23, what course a plaintiff has to adopt in the magistrate's court under similar circumstances. He has first to get a judgment of the court of resident magistrate, and after that, if it appears from the messenger's return that no movable property has been found where-with to satisfy the judgment the plaintiff may serve upon the defendant notice in writing informing him that application will be made to the Court for an order condemning him to deliver up possession of the house, lands or premises in respect of which the rent is due. That is the procedure that has ordinarily to be followed, as laid down in section 23. A short cut can, however, be adopted, if it is possible to prove to the Court that no property of the defendant can be found upon which execution can be levied. Mr. *Davis* says it is very difficult to prove a negative and to show that the defendant possesses no property whatsoever. It may be

difficult, and if it cannot be done, section 25 cannot be invoked. In these circumstances the magistrate's judgment was correct. The appeal must be dismissed.

CURLEWIS, J.: I concur.

Appellant's Attorney: *W. de Villiers*.

SCHARFF'S TRUSTEE v. SCHARFF.

1915. *September 21, 22, 23, 28, 29.* DE VILLIERS, J.P., MASON and GREGOROWSKI, JJ.

*Insolvency.—Alienation.—Lawful consideration.—Natural affection.—Expectation of insolvency.—Extent of avoidance.—\*Secs. 33 and 37 of Law 13 of 1895.—Alienation in fraudem creditorum.—Common law remedy.*

An unregistered deed of donation imposed a liability on the donor to cede certain bonds to a value of over £500 to his daughter. Thereafter the donor, at a time when he should have expected the sequestration of his estate ceded the bonds to his daughter and was subsequently sequestered. *Held*, in an action by the trustee to set aside the cession that natural affection for one's daughter was not a lawful consideration in terms of sec. 33 of Law 13 of 1895, and that where the alienation caused an excess of liabilities over assets the alienation was avoided only to the extent of the deficiency, calculated at the time of the liquidation of the estate.

Where an alienation has been made by an insolvent *in fraudem creditorum* and the creditors are actually damnified at the date of the liquidation of his estate, the alienation is, under the common law, null and void to the extent necessary to pay the creditors the full amount of their claims.

Prior to insolvency an insolvent was charged with a criminal offence, a conviction on which would, to his knowledge, render him liable to an action for heavy damages. While on his trial the insolvent ceded certain bonds to one of his creditors knowing that such cession would, in all probability, make him insolvent if damages were awarded against him, *Held*, that such cession was *in fraudem creditorum*.

\* Sec. 33 of Law 13 of 1895 reads: "Every alienation of, and every mortgage or pledge of any portion of the estate, made or constituted by the insolvent at any time when he could expect the sequestration of his estate, is void unless such act was done in good faith and for lawful consideration.

"When an act as above is the cause of the debts exceeding the assets it shall be void in so far as such (*dit laatste*) is the case."