REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

(3) REVISED: ~~YES~~ / NO

8 April 2024

_____ _____

DATE

SIGNATURE

APPEAL CASE NO: A185/2023

In the matter between: -

CRAIG ALEXANDER HILTON HOWIE Appellant

VS

EILEEN ROXANNE DAREN N.O. Respondent

Heard on: 7 February 2024

Delivered: 8 April 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 8 April 2024.

ORDER

It is ordered: -

1. The appeal is upheld with costs.
2. The sequestration application is dismissed with costs.

JUDGMENT

MAZIBUKO AJ (Kooverjie J and Mkhabela AJ concurring)

THE APPEAL

[1] In this appeal, the appellant seeks to set aside the judgment and order of the court *a quo* in granting the final sequestration order.

[2] The two core grounds of appeal raised are that personal service of the sequestration proceedings on the appellant was irregular and that a case for sequestration had not been made out.

[3] More specifically, the contentions raised are that the provisional order for sequestration was granted without the appellant having knowledge of the proceedings and that the appellant was solvent at all relevant times. It was pointed out that the appellant had paid the undisputed part of the respondent's claim and the remainder of the respondent's claim into the appellant's attorneys of record trust account as security for the payment of the respondent's claim. It was specifically contended that the email of 7 July 2020 could in no way be envisaged to be an act of insolvency.

[4] It is trite that the scope for interference on appeal with the exercise of "true discretion" is limited. A court of appeal may only interfere if there was a misdirection of fact or a wrong principle of law.[1]

SERVICE OF THE APPLICATION

[5] The first issue for consideration is whether the court *a quo* was correct in finding that the sequestration application was served on the appellant before the provisional order was granted.

[6] In my view, the court *a quo* correctly dealt with this aspect. It was common cause that the sequestration application was served on the appellant via email on 8 October 2020. However, it was alleged that service was not effected at the proper address of the appellant but that of "Quantibuild". The person, Nomsa Mbonyane, on whom the application was served, was, in fact, an employee of Quantibuild and not of the appellant.

[1] Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC), paragraph 114

[7] The appellant argued that it had no relation to this entity. From the papers, it appeared that there was confusion regarding the location of the correct address. The court *a quo* was apprised of all these facts.

[8] The appellant further argued that he was not informed of the hearing date of the sequestration application. In my view, this argument has no merit. The purpose of the notice of motion is not to inform the respondent of the date on which the matter is to be enrolled, nor does it require including a date on which the application should be heard. The rationale behind service is to give notice to the opposing party of the application proceedings which has been instituted against it.[2]

[9] It is also common cause that the sheriff attempted service on the residential address of the appellant but was unsuccessful. For this reason, the matter was removed from the roll for better service. Thereafter, service was attempted on the appellant's residential address on at least two occasions, and on each occasion, the premises were found to be locked. Again, the court *a quo* was apprised of these facts at the provisional sequestration stage. The court was satisfied that the provisions of Section 11(2) of the Insolvency Act[3] were met.

[10] The court *a quo* at paragraph [10] stated:

> *It is evident that Raulinga J was apprised of the problems that the sheriff had experienced in serving the application personally on the respondent. It considered all the arguments and was satisfied with the facts. Even if the service was defective, I am satisfied that service was effected on the respondent. Furthermore, the purpose of service, being that the defendant or respondent has been made aware of legal*

[2] Sacerdote v Stromberg (34218/2018) [2019] ZAGPPHC 114 (27 February 2019), paragraph 11

[3] Section 11(2) of the Insolvency Act 24 of 1936 reads: "If a debtor has been absent during the period of twenty-one days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it is sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the Gazette, or may direct some other mode of service."

proceedings instituted against him, had been achieved in that the respondent was before the court, having received notice of the provisional sequestration order…"

[11] Notably, even if service of the sequestration application was defective, the court *a quo*, in the exercise of its discretion, could condone same. In this instance, there is no doubt that the appellant received notice of the sequestration application before the provisional sequestration order was granted. Furthermore, the appellant has fully participated in the ventilation of this matter. Hence, no prejudice was suffered as a result of any shortcoming or defective service by the sheriff with respect to the sequestration application.

[12] Section 9 of the Insolvency Act empowers a court to dispense with furnishing a copy of the application where the court is satisfied that it is in the interest of creditors. Section 9(4)(A)(a)(iv) of the Act reads:

"When a petition is presented to the court, the petitioner must furnish a copy of the petition to the debtor, unless a 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."

[13] The word 'furnish" in Section 9 of the Act was considered by our courts. The Constitutional Court in ***Stratford & Others v Investec Bank Ltd and Others***[4] held that "furnish" requires that applications be made available in a manner reasonably likely to make them accessible. In ***Chiliza v Govender***[5], the Supreme Court of Appeal found that *the word "service" is expansive and encompasses several forms of notification which may not entail personal service.*

FINAL SEQUESTRATION

[4] 2015 (3) SA 1 (CC) paragraph 40.
[5] (20837/14) [2016] ZASCA, paragraph 11.

[14] In order to succeed with a final sequestration order, the respondent is required to prove, on a balance of probabilities, that:

14.1 there is a claim against a debtor, entitling him to apply for a sequestration of the debtor's estate.

14.2 the debtor has committed an act of insolvency or is insolvent and

14.3 there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated.

(i) <u>The first requirement: the indebtedness</u>

[15] To succeed with an application for sequestration, the respondent only needs to satisfy the court that it has a claim of more than R100.00 against the appellant. It was common cause between the parties that the respondent advanced an amount of R350,000.00 to the appellant, to which he currently remains partially indebted to the respondent.

[16] In this instance, the appellant prepared an acknowledgement of debt and signed same on 17 December 2019. He further committed to a date when the debt would be satisfied. Based on these facts, the appellant cannot deny his indebtedness to the respondent. The acknowledgement of debt and the correspondence between the parties established that the respondent had a claim against the appellant. The appellant undertook to effect payment until he could settle the debt. Accordingly, the court *a quo* was correct in finding that a claim against the appellant existed.

[17] On the aspect of the appellant's counterclaim, the court *a quo* at paragraph [15] found:

> *"There are no allegations in the counterclaim of an agreement which have been concluded by the parties and that invoices will be remitted for the services as claimed. This is also the case pertaining to the invoices in respect of the accommodation allegedly provided by the respondent. I note that the invoices created by the respondent are all*

payable to Inyanga Trading 32 (Pty) Ltd and not to the respondent in person."

[18] The appellant alleged that the respondent was indebted to him for various services rendered and items bought on behalf of the respondent as per the invoices. It was alleged that the counterclaim was premised on various oral agreements entered with the respondent. Such counterclaim was pursued by way of action proceedings.

[19] In my view, the counterclaim cannot be a basis to resist a sequestration order. Our courts have held: "*The existence of a counterclaim which, if established, may result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not*."[6]

[20] In ***Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd (Afgri Operations)***[7], the Supreme Court of Appeal, in respect of an alleged counterclaim, had the following to say:

"[13] As mentioned above, <u>mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up</u>. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects, the Court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: <u>the onus is not discharged by the respondent merely by claiming the existence of a counterclaim</u>. The principles of which the Court a quo

[6] LHF Woods Ltd (1970) Ch 27 (CA); [1969] 3 All ER 882 (CA); Ter Beek v United Resources CC & Another 1997 (3) SA 315 (C) at 333H.
[7] 2022 (1) SA 91 (SCA), paragraph 13.
[8] My underlining.

lost sight are: (a) as set out in Badenhorst and Kalil, once the respondent's indebtedness has prima facie been established, the onus is on it to show that his indebtedness is disputed on bona fide[8] *and*

and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide."

[21] The appellant further contended that the court *a quo* failed to take into account the amount he paid to his attorneys' trust account pending the outcome of his counterclaim. An amount of R258,404.96 was paid to his attorneys as alleged security for the respondent's claim.

[22] On this point, the respondent raised the following contentions:

22.1 This was not security paid for the claim of the respondent. Instead, it was monies that the appellant had placed in his attorneys' trust account to be held on his behalf;

22.2 At the time the money was paid into the attorneys' trust account, the appellant was divested of his estate as he was provisionally sequestrated. Such monies are to be included in the debtor's insolvent estate. Consequently, such payment into the attorneys' trust account constitutes an impeachable transaction;

22.3 The appellant's three months' bank statements from June 2021 to September 2021 reflected a negative balance.

[23] Although the court *a quo* did not specifically pronounce on this particular point, the appellant nevertheless had finances at his disposal at the time. It was alleged that the disputed amount was placed in the attorneys' trust account.

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(ii) <u>The second requirement: the act of insolvency</u>

[24] It was argued that the email of 7 July 2020 constituted an act of insolvency. In such correspondence, the appellant explained that all his sources of income were either stymied or delayed; his monthly expenses exceeded his income; he was exploiting every opportunity to improve his income and would pay the respondent as soon as it was possible to do so. The contents read:

> "*I have done everything in my power to assist you before this situation and since, you seem to have a very short memory.*
> *My situation as many, many others has been severely impacted by Covid-19. All sources of my income have been either stymied and/or delayed, completely outside of my control. My monthly expenses at this stage exceed my income by a factor of 3, despite this I have sweated to make it up and kept the building going so that you will have a place to stay. I am doing everything in my power to sort this issue out and exploiting every opportunity to improve my income over this period.*
> *I am under constant stress as you are, but you are not being fair at all. You cannot say that I have not been there for you when you needed me, always at my own expenses.*
> *I have always paid back my debts, and I will pay you as soon as it is humanly possible to do. (sic)"*

[25] The court *a quo* found such explanation to be an act of insolvency as contemplated in Section 8(g) of the Insolvency Act, where the debtor has given notice in writing to his creditors that he is unable to pay his debt. Accordingly, the appellant's expenses exceeded his income and he was unable to pay his debts.

[26] It is trite that for an act of insolvency to be seen as a notice of one's inability to pay, the notice must be such that on its receipt, any reasonable person or

business would conclude that the debtor was unable to meet his obligations or that he would no longer continue to pay his debts in the ordinary course or that he would be unable to carry on with the business unless the creditors granted him some sort of concession.[9]

[27] However, the proposition that a debtor commits an act of insolvency when he sends a letter to creditors stating that he was unable to pay at the time must, in my view, be considered with circumspection.

[28] Our courts have endorsed the approach set out in ***Barlow's (Eastern Province) Ltd v Bouwer***[10], which states that the enquiry should be: How the reasonable person in the position of the creditor receiving the notice would understand it. To such a reasonable person must be attributed the creditor's knowledge at the time of the relevant circumstances.

[29] In ***Standard Bank of SA Ltd v Court***[11]**,** the court adopted the aforesaid test and stated:

[133] *"The letter, of course, does not say, in express terms, that the respondent cannot pay. But a debtor who gives notice that he will only be able to pay his debt in the future gives notice in effect that he 'is unable' to pay. A request for time to pay a debt which is due and payable will, therefore, ordinarily give rise to an inference that the debtor is unable to pay a debt, and such a request contained in writing will accordingly constitute an act of insolvency in terms of s 8(g)….*

Inability to pay must be distinguished from unwillingness to pay. If the debtor is merely saying that he is unwilling to pay, the letter does not constitute an act of insolvency.

[9] Lipworth v Alexander & Barkhan 1927 TPD 785

[10] 1950 (4) SA 385 (E), paragraph 390E-H.

[11] 1993(3) SA 286(C), paragraph 293, [1993] 3 All SA 729 (C) (Confirmed on appeal in Court v Standard Bank of SA Ltd; Court v Bester NO and Others 1995 (3) SA paragraph 123 (AD) paragraph 133-134D-E

Construing the written notice involves deciding how the reasonable person in the position of the creditor receiving the notice would understand it. If a reasonable person in the position of the creditor to whom the notice is addressed would understand the notice to mean that while the debtor was unwilling to pay his debt forthwith, he could nonetheless do so if pressed, then the notice will not constitute an act of insolvency[12]. (Barlow's (Eastern Province) Ltd v Bouwer.

In each case, where there is a request for time, the inquiry, therefore, is whether the content of the written statement, viewed together with the circumstances to which it may be permissible to have regard, is such as to negative the inference arising from the request for time to pay and to justify the conclusion that the debtor would be able to pay at once if pressed to do so. The mere fact that the debtor's assets may exceed his liabilities would not be sufficient (compare Lipworth v Alexander and Barkhan 1927 TPD 785)."

[30] Later, the Supreme Court of Appeal, in ***O'Shea No v van Zyl and Others No***[13], said: "[26]…*The letter was unambiguous and must stand or fall as an act of Insolvency on its own terms. It cannot be subject to interpretation by reference to events which occurred or knowledge which was obtained subsequent to its writing. The proper approach to determining whether a letter contains a notice of inability to pay in terms of s 8(g) is to consider how it would be understood by a reasonable person in the position of the creditor at the time he receives it, taking into account that creditor's knowledge of the debtor's circumstances:* ***FirstRand Bank Ltd v Evans***.[14]

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[12] My underlining

[13] 2012 (1) SA 90 (SCA), paragraph 26.

[14] The court in O'Shea referred to FirstRand Bank Ltd v Evans, 2011 (4) SA 597 (KZD) at paragraphs 14 and 15,

where it was held: *"[14] The proper approach to adopt in determining whether a letter such as this constitutes a notice of inability to pay in terms of s 8(g) is to consider how it would be understood by a reasonable person in the position of the creditor receiving the letter. In construing it, the knowledge that the creditor would have of*

[31] On the facts before me, I accept the explanation that the appellant did not say he did not have the means to pay or refused to finally pay. He advised that despite the change in his circumstances, he made up his income shortfall by continuing to renovate the building. It cannot be disputed that he undertook to pay the respondent. In other words, it was not that he was unable to pay but that he was unwilling to pay.

[32] Upon receiving the said email, the respondent was not only aware of the appellant's circumstances, she was a family friend. The appellant became her advisor in her various business interests. She was also in the process of moving into a flat on his premises that he had renovated for her. The respondent was aware that the appellant had assets which could satisfy her debt at the time. Notably, in the ***Standard Bank*** matter, the court took the following into account and stated: "*If, on the other hand, the debtor has disposable assets which could readily be converted to cash in an amount which is sufficient to pay the debt, or the debtor is the owner of unencumbered immovable property against which funds could promptly be raised, these facts could well serve to rebut the inference that the debtor is unable to pay and indicate that he is merely unwilling to do so."*

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the debtor's circumstances must be attributed to the reasonable reader…

[15] In my view, Mr Kemp is correct. The Section is couched in the present tense and is invoked where the debtor gives notice to the creditor of an inability to pay debts. Clearly, the notice must do that when the creditor receives it. The question is what it means to the recipient at the time of its receipt. Otherwise, it is conceivable that an otherwise innocuous letter could take on a fresh colour as a result of subsequent events, which could be highly prejudicial to the debtor. In my view, the authors of Insolvency Law are correct in saying that 'a notice of inability to pay debts does not cease to be an act of insolvency as a result of circumstances obtaining subsequently to the giving thereof'. This accords with the view of Horwitz J in Chenille Industries v Vorster 1953(2) SA 691 (O) at 696D - E, in rejecting a submission that subsequent events affected the meaning to be given to a notice alleged to fall under s 8(g), that, 'if the act be unequivocal, it cannot be explained away by circumstances arising subsequently."

[33] The email, therefore, cannot be construed in the eyes of any reasonable man of business as illustrating that the appellant was unable to meet his financial obligations, that he would no longer continue to pay his debts in the ordinary course, or that he would be unable to carry on business unless creditors granted him some concession.

[34] Our courts have reiterated that the notice must be one of inability to pay as distinct from one of unwillingness to pay, refusal to pay, or intention to suspend payment. One is to have regard to not only the language of the notice but also the debtor's state of mind and what was objectively known to the recipient.

[35] Moreover, apart from the appellant having sufficient disposable assets to meet the debt, he had, in fact, paid the undisputed debt and had placed the amounts equivalent to the disputed debt in the trust account of his attorneys. The information set out in his “Statement of Debtor’s Affairs” was not disputed. It reflected that he owned the Tiegerpoort property valued at R8 500 000. He has a shareholder’s loan in Noble Aerospace (Pty) Ltd, Inyanga Trading and Richland Consulting (Pty) Ltd valued at R200 000, R950 000, and R450 000, respectively. He had creditors to the value of R4 370 709,93.

[36] In ***Barlows (Eastern Province) v Bouwer***,[15], the court was required to consider a similar scenario, whether the correspondence from the applicant constituted a deed of insolvency. In this matter, the letter that the debtor had sent to the creditor read as follows:

> *“In connection my account, I am so sorry in having disappointed you. Unfortunately, I have been seriously ill in hospital in Cape Town since November last year. I have just arrived back now. And I hope I can pump now and try out the pump and engine. As regards payment I am*

[15] Number 10, *supra*.

expecting pension money from the irrigation department that I applied for a refund thereof. I must get 20 years' pension money. Secondly, I have raised a bond on my farm. Tool money is granted, and all necessary valuations, etc., has been made, and soon after registration of bond, I will be in a position to meet my liabilities. So please have a little patience and I am willing to pay interest at bank rates on my overdue accounts."

At paragraph 391 E-F, the court's view was:

The letter is merely a proposal made by a solvent person. Not "desirous of crippling himself, asking if the applicant is willing to wait and not a clear statement that he cannot pay if the applicant refuses to assist him and demands payment in a specified time. No reasonable man could understand from this letter that the respondent had not the means to pay or refuse finally to pay if the applicant insisted on payment at once and did not intend to allow the respondent to conserve his assets and pay by the raising of the bond."

At 391F to 392A, the court went on further:

"What has happened is that the debtor has not given notice that he is unable to pay but that he is unwilling to pay. He has repudiated the obligation to pay on demand but is unwilling to pay by realising his assets and has given the creditor the right to sue him for good but not to make him insolvent under Section 8(g)."

At 392C, the court therefore concluded:

"Hence, the letter does not constitute an act of insolvency."

[37] In my view, similarly, this is not a case where the appellant was unable to pay. If the appellant was forced to pay, he would come up with the funds. He was clearly unwilling to pay the disputed amount. The respondent has, therefore, failed to establish an act of insolvency on the part of the appellant. Accordingly, the letter could not serve as notice by the appellant that he was unable to pay his debts for the purposes of Section 8(g) of the Insolvency Act.

[38] I do not deem it necessary to deal with the third requirement, namely, whether creditors would benefit from sequestrating the appellant. The application for sequestration fails on the ground that an act of insolvency has not been established, and on this ground alone, the application cannot succeed.

[39] The court *a quo* erred in its findings. Consequently, the appeal made against the sequestration order is upheld. The order of the court *a quo* is replaced with the following order:

1. The appeal is upheld with costs.
2. The sequestration application is dismissed with costs.

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N. MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree,

_____

H. KOOVERJIE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree,

_____

R.B. MKHABELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the appellants:	*Adv. HM Barnardt*
Instructed by:	*DLBM Attorneys*
Counsel for the respondent:	*Adv. R de Leeuw*
Instructed by:	*Daan Beukes, Attorneys*
Date heard:	*7 February 2024*
Date of Judgment:	*8 April 2024*