**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2014/24159**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... .....
DATE SIGNATURE

In the matter between:

**DREYER & NIEUWOUDT** Applicant

And

**MARTIN, STEPHANUS** Respondent

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**J U D G M E N T**

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**MAKUME, J:**

INTRODUCTION

[1] This is an application for sequestration of the estate of the respondent.

THE PARTIES

[2] The applicant is a firm of attorneys which conducts business from 16 End Road, Linden Extension in Randburg.

[3] The respondent is an adult male businessman who conducts business as Sub-Tropical Garden and Pool Services CC. He is married out of community of property to one Erika Martin Identity Number 7…….

BACKGROUND

[4] The respondent became a client of the applicant from approximately 1998 until October 2009 when the respondent terminated the applicant's mandate to act as his attorneys and legal advisers in various legal matters.

[5] On termination of the mandate the applicant submitted to the respondent its final statement of account for professional services rendered for payment. The respondent failed to make payment and on the 26th November 2010 the applicant obtained default judgment against the respondent for the following:

5.1 Payment of the sum of R82 277,57.

5.2 Interest at the rate of 15,5% per annum calculated on the sum of R82 277,57 from 20th January 2010 to date of payment.

5.3 Costs to be taxed.

[6] On the 29th November 2010 the applicant had a warrant of execution issued against the respondent. This resulted in the sheriff attaching a large number of the respondent's movable assets from his home situate at 74 Second Street, Linden, Johannesburg.

[7] On the 7th March 2011 an agreement was negotiated between the applicant and the respondent's attorneys in terms of which the applicant withheld the removal of the attached goods on condition the respondent signed an agreement to make payment of the capital plus costs and interest at the following rate:

7.1 R3 000,00 on the 1st March 2011.

7.2 R4 000,00 per month for twelve months with effect the 1st April 2011 to 1st March 2012.

7.3 Payment of the balance of the judgment debt, interest and taxed costs by 1st April 2012.

[8] The costs were taxed on the 4th March 2011 in the sum of R4 389,39. The respondent did not sign the agreement to regulate payments but proceeded to make payments. Despite his undertaking the respondent made irregular payments not in accordance with his undertaking and stopped payment in June 2012 having paid only R29 000,00.

[9] The balance owing by the respondent to the applicant as on the 30th September 2013 stood at R101 819,30.

[10] When no further payments were being received the applicant sent to the respondent sms reminders and when these were not heeded to the applicant re-issued the warrant of execution and instructed the sheriff on the 2nd March 2012 to make a first attachment of the respondent's assets at 74 Second Street, Linden, Johannesburg.

[11] On the 27th August 2012 the sheriff made a return which reads as follows:

> "*The warrant of execution in this matter was not served at 74 Second Street, Linden, Johannesburg as the premises were found vacant and the executor debtor left. No indication of the executor debtor or a possible new address could be ascertained.*"

[12] The applicant having failed to successfully trace the whereabouts of the respondent launched this application which was served by substituted service. On the 19th August 2014 Hiemstra JA granted a provisional

sequestration order. On the 2nd September 2014 the respondent entered appearance to oppose the granting of a final sequestration order and in due course served and filed his answering affidavit.

THE APPLICANT'S CASE

[13] The applicant obtained judgment against the respondent for a substantive amount of money. The judgment debt plus interest and taxed costs remains unpaid to date hereof. The total amount presently owing is the sum of R101 819,80. The applicant is accordingly a creditor as defined in section 9(1) of the Insolvency Act.

[14] It is the applicant's case that the respondent has committed an act of insolvency in terms of section 8(a) of the Insolvency Act in that after becoming aware of the judgment debt the respondent departed or left his dwelling at which a warrant of execution had been served with the intention to evade or delay payment of his debt.

[15] In support of the above act of insolvency the applicant relies on section 109(1) of the Magistrate's Court Act 32 of 1944 which reads as follows:

> "*Any person against whom a court has in a civil case given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he is liable in connection therewith shall if he has changed his place of residence, business or employment within 14 days from the date of every such change notify the clerk of the court which gave such judgment or made such order and the judgment creditor or the judgment creditor's attorney or if his estate is under administration the administrator or his attorney, fully and correctly in writing of his new place of residence, business or employment.*"

[16] In conclusion the applicant argues that there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated.

THE RESPONDENT'S CASE

[17] The respondent opposes the granting of a final order of sequestration firstly on the basis that the applicant does not have a liquidator claim against the respondent as required by sections 12 and 9(1) of the Insolvency Act. Secondly, the respondent denies that it has committed an act of insolvency and lastly the respondent disputes that the sequestration of his estate will be to the advantage of his creditors.

THE LAW APPLIED TO THE FACTS

[18] Section 12 of the Insolvency Act 24 of 1936 ("*the Insolvency Act*") states as follows:

> "*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;*
>
> *(b) the debtor has committed an act of insolvency or is insolvent;*
>
> *(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.*"

[19] The respondent's first point of opposition as I understand it is that whilst he admits that at some stage he owed the applicant money he paid it and secondly that the judgment was obtained by technical default on his part because he was opposing same when the court granted the judgment. It is on this basis that he argues that the amount claimed is not a liquidated amount.

[20] There is absolutely no merit on this argument for when the applicant issued a writ and had goods of the respondent attached the respondent did not attack the validity of the judgment debt neither did he seek to apply for rescission thereof.

[21] It is trite law that when a sequestrating creditor relies on a judgment the court must in the absence of any proceedings to set it aside regard the judgment as valid. In the matter of *Behrman v Sideris and Another* 1950 (2) SA 366 (T) at page 368 the court had to deal with more or less a similar defence raised by the respondent. In the last paragraph on page 36F his Lordship Roper J said the following:

> "*With regards to the first of these grounds I am unable to see how I can treat the judgment debt in question as null and void. Under section 36(b) of the Magistrate's Court Act the court is given power to rescind or vary any judgment granted by it which was void ab origin and if the contention of the respondent is that this judgment was void they should as it seems to me have applied to the Magistrate's Court under that section for an order rescinding the judgment on the ground alleged.*

> *That step was not taken by the respondent and the judgment therefore stands unrescinded.*"

[22] In the matter of *Van Heerden v Bester* 1961 (3) SA 625 (OPD) the court held that a judgment for the balance of the purchase price and interest *a tempore morae* against transfer of the property sold is not liquidated if it appears that the seller has not tendered and probably will be unable to effect transfer but that taxed costs incurred in obtaining such judgment are liquidated. At page 629 of the judgment Hofmeyer R writes as follows in paragraphs B-C:

> "*Aangesien die appellant verplig en geregtig was om die gedingskoste aan te gaan ten einde sy vonnis te verkry is ek van mening dat hierdie toegewing tereg gemaak is. In die omstandighede van hierdie saak moet die vordering vir koste van geding as 'n selfstandige vordering gesien word. Die bedrag hierby betrokke sou ook voldoende gewees het om die appellant as applikant in die sekwestrasie aansoek te kwalifiseer.*"

[23] Accordingly I have come to the conclusion that the judgment debt obtained by the applicant against the respondent is liquidated and remain unpaid and suffices to clothe the applicant with the necessary *locus standi* in accordance with section 9(1) of the Insolvency Act.

[24] This bring me now to the other three grounds on which the applicant seeks a final sequestration order. The applicant bears the *onus* to show on a balance of probabilities and taking into account the requirements as set out in section 12 of the Insolvency Act that the provisional order should be made

final. There is no *onus* on the respondent only an evidentiary burden to establish that confirmation of the provisional order is being resisted on *bona fide* and reasonable grounds. If the respondent is able to do so the provisional order must be discharged and the application for final sequestration dismissed (see *Hanover Reinsurance Group Africa (Pty) Ltd and Another v Gungudoo and Another* 2012 (1) SA 125 (GSJ).

SECTION 8(a) OF THE INSOLVENCY ACT

[25] Section 8(1) reads as follows:

> "*A debtor commits an act of insolvency:*
>
> *(a) if he leaves the Republic or being out of the Republic remains absent therefrom or departs from his dwelling or otherwise absents himself with intent by so doing to evade or delay the payment of his debts.*"

[26] The key words in section 8(a) is "*the intention to defeat or delay creditors in obtaining payment*". This is what must be clearly established by the applicant in order to succeed with his application.

[27] It is not in dispute that after the applicant had made attachment by way of a writ of execution of a sizeable amount of the respondent's movables the respondent vacated that dwelling. A year later when the applicant reissued the writ it was discovered that the respondent had vacated the premises

without having given notice to the applicant in terms of section 109 of the Magistrate's Court Act.

[28] In reply the respondent says that he and his wife left the residence at 27 Linden because they were just tenants and the owner requested them to vacate as he was selling the house. Secondly, he says that he stopped paying the debt because according to his calculation he had paid what was owing in full. Thirdly, he says he did not give his new address to sheriffs as he was protecting his wife who was involved in a domestic dispute with her ex-husband. The respondent further says that is type of business does not consist of a shop where clients come and buy products or services. Instead clients would phone their offices and they go out to render services at the client's chosen premises.

[29] The question is does this conduct suffice to fall within the definition of section 8(a) of the Insolvency Act? There must be evidence of an intention to evade creditors that must exist and be established. Mere absence from one's residence is not necessarily sufficient proof because there may be a satisfactory explanation.

[30] In this matter shortly after the applicant had caused attachment of the respondent's movables, the respondent addressed a passionate letter to the applicant on the 22nd February 2011. That letter is attached to the founding affidavit and is marked "JLD6".

[31] Extracts from that letter which in my view do not support the applicant's view that the respondent's intention was to evade a delay payment are the following:

> "*Johan ek is meer as bereid om al die rekeninge te betaal. Ek voel net dis onregverdig en inkorrek om die mandaat wat ek op 19 June 2009 geteken het op alle werk toe te pas voor daardie datum. Dit was my dispuut van die begin af.*
>
> *Jy weet vanself deur watter trauma ek sedert Januarie 2006 is toe ek en Illana begin skei het. Ek het self seker gemaak dat jy die transfer attorney van ons woming was to Illana Amy Ledger op die vorm wou invul.*
>
> *Ek bid en glo dat jy bogenoemde aksie sal staak sodat ons die uitstaande geld kwessies kan bylê en ek jou kan terugbetaal so spoedig moontlik.*"

[32] The tone and contents of that letter do not demonstrate a person who had an intention at that time and when he vacated the house number 74 Linden to evade paying his longstanding attorney. The letter indicates that the relationship between the applicant and the respondent predates the year 2009 for it appears that in the year 2006 applicant was instructed to attend to the transfer of the respondent's house when he divorced his former wife.

[33] The reality of the matter is that the respondent was requested to vacate the house as it was sold. This evidence by the respondent remains uncontested. The respondent's good were placed under attachment on the 10th December 2010 and he only vacated the premises during July 2012 some eighteen months later. If it was the intention of the respondent to evade payment he could have left with the attached goods immediately after December 2010 he did not do so. The applicant if he was not satisfied that

the respondent is able to pay the would have removed the goods and sold same in execution.

[34] The evidence before me demonstrates that the respondent is a businessman who has been plying his trade as a garden service in the area of Linden and Bryanston. The tracing report indicates that he has moved from one place to the other within the same area. I do not believe that there is indication of a person bent on avoiding his creditors.

[35] I am according not persuaded that the respondent has committed any act of insolvency and the application should be dismissed on this aspect alone.

SECTION 8(g) OF THE INSOLVENCY ACT

[36] This section reads as follows:

> "*A debtor commits an act of insolvency:*
>
> *(a) If he gives notice in writing to any of his creditors that he is unable to pay any of his debts.*"

[37] The applicant refers to a series of letters that were exchanged between the applicant and the respondent's attorneys. The letter commences with an offer on the 9th June 2011 by the respondent to liquidate his indebtedness to the applicant in monthly instalments of R2 000,00 instead of R4 000,00

suggested by the applicant. It is when no agreement could be reached that the applicant comes to the conclusion at paragraph 101.6 when it says the following:

> "*The applicant submits that the above correspondence from the respondent represented by Scott Attorneys is evidence of the respondent's inability to pay the applicant's claim.*"

[38] The conclusion arrived at by the applicant and that the respondent is unable to pay the debt based on correspondence that dates 3 years ago is untenable. Secondly, even if correspondence had been written in 2014 in my view it will be incorrect to ascribe a meaning to the words used that an act of Insolvency in terms of section 8(g) had been committed.

[39] In the matter of *Du Plessis v Tzerefos* 1979 (4) SA 819 (C) it was held that it is not the subjective intention which is important but the intention as it appears from the words used. The words used by the respondent in this matter do not mean that he is unable to pay the judgment debt quite to the contrary he says he wants to pay the amount off in particular instalments.

[40] In the matter of *Shaban and Co (Pty) Ltd v Plank* 1966 (1) SA 59 (O) and *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 138 (O) the court held that where a debtor has made application for an administration order under section 74 of the Magistrate's Court Act and where his assets exceeded his liabilities and where he made arrangements to pay his creditors that such an application could not be relied on as an act of insolvency. The application

must be construed according to its tenor as a whole and not according to the meaning in isolation of certain words.

[41] In the *Shaban* matter (*supra*) De Villiers AJP says the following at page 63E-G:

> "*The word 'unable' in the sentence and I am unable to liquidate my liabilities forthwith was obviously not meant to be taken literally. What he in all probability intended to convey was that although his assets substantially exceeded his liabilities and were largely of such a nature that if he were forced to do so he would be able to liquidate enough forthwith to pay his creditors in the ordinary course of business he was unwilling to do so because that would result in a fairly good business being liquidated. It was in that sense that he used the word unable. For that reason he proposed that his creditors should not oppose his application to be allowed to pay R60,00 per month for pro rata distribution between them under an administration order. In other words the allegations contained in paragraph 3 read in the light of the surrounding facts was intended as no more than a portion of a proposal to his creditors by a solvent trader not desirous of crippling himself to wait and was not a clear statement that he could not pay if they refused to assist him and demanded payment. No reasonable creditor with the knowledge at his disposal could have understood from the words used that respondent had not the means to pay or that he refused finally to pay if the creditors would not allow him to proceed with his application for an administration order and resulted on payment of their claims forthwith.*"

[42] In the *Rodrew* matter (*supra*) the applicant sought to rely on a *nulla bona* return that was two and a half years old. The court at page 139B-C said the following:

> "*There is however a further serious difficulty regarding the evidentiary value of the return in proof of the commission of the said act of insolvency. That difficulty is occasioned by the fact that the return is two and a half years old. When it is sough to invoke the said of so venerable a document these must at least be an allegation based on*

> *facts mentioned in the application that the debtor's position is unchanged. No such allegation is made by the applicant and there is nothing to indicate that the respondent's position has in fact remained unchanged from what it was on 15 June 1972. On this ground also I find that the applicant cannot rely on the return for proof of the alleged acts of insolvency funded thereon.*"

[43] The position is similar in the present application. The correspondence relied upon is two years old and cannot be relied upon as proof of an act of insolvency in terms of section 8(g) of the Act. The applicant has accordingly failed to prove this act of insolvency.

PREFERRING ONE GREATER ABOVE ANOTHER SECTION 8(c) OF THE INSOLVENCY ACT

[44] This section envisages two situations an actual disposition and an attempted disposition of the debtor's property. The applicant argues that the respondent committed an act of insolvency under this section when his immovable property was attached and sold in execution by the bank. He added that because there is still a shortfall due to the bank notwithstanding the sale in execution that therefore by making payments in reduction of the payment of the shortfall the respondent is prejudicing the applicant and is thus preferring the bank over the applicant and other creditors.

[45] This conclusion by the applicant is not correct. It actually means the opposite. In his affidavit the respondent says that he is not arrears with his personal accounts and has been making monthly instalments as required by the various financial institutions including Nedbank.

[46] In Mars *The Law of Insolvency in South Africa* 9th Edition at pages 94-95 the learned writer says the following:

> "*A debtor who allows judgment to be given against him and his assets to be sold in execution with the result that certain of his creditors are preferred does not commit any act of insolvency (see Ex Parte Garlick 2 SC 111; Ex Parte Grobbelaar 1915 CPD 13) unless it is established that the debtor colluded in a dishonest and fraudulent fashion with the creditor to obtain a judgment as art of a scheme to defeat the object of the Act.*"

[47] I remain unpersuaded that the respondent committed any act of insolvency under this section.

ADVANTAGE OF BENEFIT TO CREDITORS

[48] Before a court can grant a final order of sequestration it must be satisfied that there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated. It was held in numerous cases that advantage to creditors means advantage to all or at least the general body of creditors and not advantage of a mere majority of them.

[49] The applicant is the only creditor who seeks sequestration the other known creditors namely Nedbank is indifferent and has shown no interest in participating in the application for sequestration. The applicant has no mandate to speak on behalf of other creditors and can thus not conclude on their behalf that a sequestration will be to their advantage.

[50] The *onus* of satisfying the court that it will be to the advantage of creditors to grant a final sequestration order rests with the applicant. His Lordship Davis J in the matter of *Wilkins v Pieterse* 1937 CPD 166 writes as follows:

> "*It is now clear that the onus of establishing that there is reason to believe that sequestration will be to the advantage of creditors remains on the petitioning creditors throughout even where an act of insolvency has been committed and that if this onus is not discharged the court cannot grant a final sequestration order.*"

[51] The applicant has failed to demonstrate what advantage will the creditors get if the respondent's estate is sequestrated. Accordingly this application will fail and I make the following order:

(a) The rule *nisi* is hereby discharged.

(b) The provisional sequestration order is set aside.

(c) The applicant is ordered to pay the costs of this application.

DATED at JOHANNESBURG this 11th day of MARCH 2015.

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**M A MAKUME**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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