

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 34269/2014

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

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DATE

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SIGNATURE

In the matter between:

MOHSIN MAHMOOD MIA

Applicant

And

DAVID FREDERICK DEACON

Respondent

J U D G M E N T

WEINER J:

[1] The applicant applies for an order sequestrating the estate of the respondent. The respondent admits that he is indebted to the applicant in an amount of R585 000,00 arising out of a judgment obtained by the applicant

under case number 2008/22398. He, however, denies that he has committed an act of insolvency or that he is factually insolvent.

[2] In terms of section 8(a) of the Insolvency Act¹, the applicant contends that the sheriff attempted to serve the writ on three occasions, but there was never anyone at the respondent's premises. Accordingly, the Applicant submitted that the respondent has 'departed from his dwelling or otherwise absented himself for the purpose of evading and delaying the payment of his debts'. The respondent confirms that he resides at the given address together with his wife and two children and that there is also a permanent domestic worker at the premises. The respondent cannot state what his whereabouts were on the occasions when the deputy sheriff attempted to serve the writ, but he denies that he was absenting himself for the purpose of evading and delaying the payment of his debts. In my view, the applicant has not established sufficient facts to rely on an act of insolvency as defined by section 8(a) of the Act.

[3] In terms of section 8(b) of the Act, the applicant relies on a return of service issued by the deputy sheriff on the 29th August 2013. Such return of *nulla bona* was furnished over a year prior to the launching of these proceedings. The applicant in such circumstances is obliged to set out allegations supported by facts that the debtor's position is unchanged. See *Abell v Strauss* 1973 (2) SA 611 (W).

¹ Act 24 of 1936

[4] In addition the respondent disputes what transpired upon the service of the writ of execution. He states that the sheriff did not enquire as to whether he had any other disposable assets but merely whether he had any movable assets which could be attached at the premises. The sheriff's return appears to have been executed at No. 1 Fifth Avenue, Northwold "*the defendant's residential address*". However at the foot of the return of service, it is recorded that the address is occupied by Junto Radio. The sheriff has not provided a confirmatory affidavit in relation to the service of the *nulla bona* return.

[5] Accordingly the applicant has failed to establish that the respondent has committed an act of insolvency in terms of either section 8(a) or section 8(b) of the Act.

[6] The applicant relies on actual insolvency as an alternative to the acts of insolvency committed by the respondent. In terms of the Act, the applicant is required to establish that the respondent is in fact insolvent; that his liabilities factually exceed his assets. The fact that a debtor has not paid his debts does not necessarily lead to an inference that he is insolvent. See *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 at 60.

[7] In the founding affidavit, the applicant alleges that the respondent owns three immovable properties that is two shares being No. 6 and No. 7 in the Sectional Title Scheme Machindi Lodge and a Sectional Title Unit being Unit 4 in the Sectional Title Scheme Lukwela Terrace.

[8] In addition the applicant alleges that the respondent holds an interest in a number of companies and close corporations and is also an income and capital beneficiary of the Kamada Trust. The respondent holds an interest in a number of other entities and own assets including a marine vessel.

[9] It appears from the applicant's own version in the founding affidavit that the respondent's disposable assets would exceed his liabilities and accordingly he would not be factually insolvent.

[10] It is only in the replying affidavit that the applicant seeks to rely on the question of factual insolvency. Even though it might appear from the respondent's affidavits that he is factually insolvent, it is insufficient for the applicant to rely on this in seeking the sequestration of the respondent's estate on the basis of factual insolvency. See *Bishop v Baker* 1962 (2) SA 679 (N) where it was held that the creditor who wishes to rely on the debtor's actual insolvency must allege and show this in his founding affidavit.

[11] In *Standard Bank of SA Ltd v Sewpersadh and Another*² Dlodlo J applied the principles espoused in *Bishop* and held that:

"The applicant bears the onus, to be discharged on a balance of probabilities, of showing the respondent to be factually insolvent. Strangely in the instant matter the applicant does not allege in his founding affidavit that either or both of the respondents are factually insolvent. Neither has the applicant made an attempt to show that the respondent's liabilities exceed their assets (jointly or severally). It is

² 2004 (5) SA 148 (C) at [19]

only in the replying affidavit that the applicant seems to bring forth facts from which insolvency can possibly be inferred. The fact of the matter is that the applicant failed to rely exclusively or alternatively on the debtor's insolvency in its founding affidavit. Reliance on the contents of the replying affidavit which were not contained in the founding affidavits amounts to reliance on new matters which the respondents have had no opportunity to reply to. The applicant's failure to allege in the founding affidavits that the respondents are de facto insolvent clearly militates against the applicant's contention in submissions before the court that the respondents are de facto insolvent."

[12] In view of the foregoing the applicant has failed to show that the respondent has either committed an act of insolvency upon which the court can rely nor that the applicant is factually insolvent. According the following order is issued:

1. The application is dismissed with costs.

WEINER J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the Applicant:	A. W. Harcourt SC
Instructed By:	Maharaj Attorneys
For The Respondent:	N Redman SC
Instructed By:	M.R Harty Attorneys
Date of Hearing:	20 April 2015
Date of Judgment:	4 June 2015