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

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

SIGNATURE DATE: 15 November 2021

Case No: 36891 / 2021

In the matter between:

**SUMENTHREN POOBALAN PILLAY** Applicant

and

**MCDONALD KUDZAI IMANI** First Respondent

**RUTENDO PRISCILLA IMANI** Second Respondent

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**JUDGMENT**

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**WILSON AJ**:

1 The applicant, Mr. Pillay, seeks the final sequestration of the respondents' joint estate. The first respondent, Mr. Imani, is married in community of property to Mrs. Imani, the second respondent. Mr. Imani and his business partner, Innocent Shavi, were the controlling minds behind Macsilla Holdings (Pty) Ltd. Macsilla borrowed R4 million rand from Mr. Pillay, but did not repay it. On 27

September 2021, my sister Crutchfield AJ finally liquidated Macsilla on the basis that it was factually insolvent, largely because it could not hope to meet its loan obligations to Mr. Pillay.

2 Shortly before Macsilla was finally liquidated, my sister Victor J provisionally sequestrated the respondents, in an order dated 13 September 2021. The issue now is whether the requirements for a final order of sequestration under section 12 of the Insolvency Act 24 of 1936 have been satisfied. In other words, the question is whether Mr. Pillay has established a liquidated claim of more than R100 against Mr. Imani; whether Mr. Imani has committed an act of insolvency or is actually insolvent; and whether there is reason to believe that it will be to the advantage of the respondents' creditors if they are sequestrated.

3 Mr. Pillay's case is that Mr. Imani must make good on Macsilla's debts under a suretyship in terms of which Mr. Imani stood as co-principal surety for them; that Mr. Imani has consistently acknowledged in writing that he cannot meet his obligations under the suretyship; that Mr. Imani has begun to dispose of his assets to the prejudice of his creditors; and that there is clearly reason to believe that the appointment of a trustee to wind up Mr. Imani's estate will be to the advantage of the respondents' creditors in these circumstances.

**The nature of the claim against Mr. Imani**

4 Mr. Imani's case, on the other hand, has changed as the proceedings have matured. He first contended that the loan Macsilla obtained from Mr. Pillay was unlawfully advanced, in breach of section 86 of the Legal Practice Act 28 of 2014. Crutchfield AJ rejected that contention when it was raised to resist

Macsilla's sequestration. Mr. Felgate, who appeared for Mr. Imani before me, did not seek to revive it.

5 It was then contended that Mr. Imani does not owe anything to Mr. Pillay. Macsilla does. The contention appeared to be that the surety given to Mr. Pillay is invalid. The surety is indeed a brief and informal document. But, as Mr. Felgate readily conceded, it meets the requirements for a valid deed of suretyship. It is in writing. It identifies the creditor (Mr. Pillay); the debtor (Macsilla) and the sureties (Mr. Imani and Mr. Shavi). The sureties have signed the document personally. The document identifies the principal debt, being R1 million that Mr. Pillay initially advanced to Macsilla, and "any future amounts that may be advanced", which in the end came to a further R3 million. Although the document does not set all of this out in meticulous detail, it is clear, having regard to undisputed facts and circumstances surrounding the conclusion of the agreement, that Mr. Imani and Mr. Shavi signed it with the intention to bind themselves as co-principal sureties for Macsilla's debts.

6 Mr. Imani's contention that he does not owe a debt to Mr. Pillay must accordingly be rejected.

7 It follows that Mr. Pillay's demand that Mr. Imani performs on the suretyship embodies a liquidated claim greater than R100.

**Acts of insolvency**

8 Mr. Pillay alleges two acts of insolvency. First, he says that Mr. Imani has sold one of his assets – a BMW motor vehicle – in order to meet his obligations to Mr. Pillay. This is said to redound to the prejudice of Mr. Imani's other

creditors, and to constitute an act of insolvency under section 8 (c) of the Insolvency Act. However, I am not satisfied that this case has been made out. Mr. Pillay may have demonstrated a disposition of assets, but there is nothing on the papers before me that suggests that the disposition was to the prejudice of any of Mr. Imani's creditors. When confronted with that reality, Mr. Kisten, who appeared for Mr. Pillay, relied on the sale of the BMW as evidence of Mr. Imani's general financial distress. But that is obviously not the same as saying that Mr. Imani has conducted himself to the prejudice of his creditors. More was required to make out a case under section 8 (c). It was not produced.

9 The second act of insolvency Mr. Pillay alleges is that Mr. Imani has acknowledged in writing that he is unable to pay his debt to Mr. Pillay under the suretyship. There are a number of written communications from Mr. Imani to Mr. Pillay on the record that acknowledge that Mr. Pillay is entitled to payment, but that Mr. Imani cannot make it. For example, on 30 December 2020, Mr. Imani wrote to Mr. Pillay and stated that "I'm not in dispute of the loan amount and as you know I have been making various payments to you when I could . . . [w]e are working to make payments and any failure to do so will result in us coming to another payment plan. The debt will [be] settled in full". The clear and necessary inference to be drawn from this message is that Mr. Imani has missed payments that are due; that he has done so because he cannot make the payments, not because he is unwilling to do so; and that he anticipates at least the possibility that he will not be able to make payments in future as and when they fall due.

10 Mr. Felgate contended that, properly construed, this and other messages that passed between the parties acknowledge no more than Macsilla's, rather than Mr. Imani's, inability to pay its debts. I think that is a strained interpretation of the messages. Read in light of the circumstances surrounding their transmission, the messages evince Mr. Imani's clear awareness of the fact that, pursuant to the suretyship, Macsilla's debts are also his, and that his sequestration is a real possibility if Macsilla's debts cannot be paid. This is also clear from the fact that, in the message of 30 December 2020, Mr. Imani expresses the view that "[t]here is no reason at this point to proceed with sequestering me, the business or any other [sureties]".

11 For all these reasons, Mr. Imani has plainly given notice that he is unable to repay a debt to Mr. Pillay that he acknowledges he owes.

**Advantage to creditors**

12 Mr. Pillay bears the onus of demonstrating to me that "there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated" (section 12 (1) (c) of the Insolvency Act). In other words, there must be facts that satisfy me that there is a reasonable prospect of the respondents' creditors deriving some benefit from their sequestration. Even if the respondents have no assets evident on the papers, it may be possible to infer from the facts that, as a result of the inquiry to be conducted under the Insolvency Act, assets may be revealed or recovered for the benefit of creditors, and that these may enable an actual payment to be made to each creditor who proves a claim. In that event, an advantage to creditors will have

been established (see *Meskin and co v Friedman* 1948 (2) SA 555 (W) at 559 and *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) at paragraph 44).

13 In this respect, Mr. Pillay's founding papers are threadbare. Paragraph 35 of the founding affidavit, in which Mr. Pillay alleges an advantage to creditors, contains no more than a series of speculations that, if a trustee is appointed to administer the insolvent estate, then assets might be found to satisfy Mr. Imani's debts. This is insufficient to ground a finding that the respondents' sequestration would advantage their creditors. Whether or not there is an advantage to creditors is an inference that must be drawn from proven facts. Without such facts, no inference can be drawn. In other words, it is not enough to assert that a trustee might uncover assets that can be disposed of to the benefit of creditors, if the facts established on the papers do not themselves indicate that there are, or may be, other assets to uncover.

14 I know from the papers that – apart from Mr. Imani's interests in two now-liquidated companies – the respondents have a house and a Range Rover motor vehicle. Mr. Imani conspicuously declines Mr. Pillay's invitation to set out any other assets in his answering affidavit. However, in the circumstances of this case, I do not think that justifies the inference against the respondents that "there is a substantial estate from which the creditors cannot get payment, except through sequestration" (*Realizations Ltd v Ager* 1961 (4) SA 10 (D) at 11D-E).

15 On the papers, the respondents have no proven creditors other than Mr. Pillay. Accordingly, there are no facts justifying the inference that the respondents' final sequestration would benefit the whole body of their creditors. Indeed, on

these papers, there are no other creditors. The advantage pressed in this case is not to the body of the respondents' creditors as a whole at all, but only to Mr. Pillay in seeking the repayment of the debt Mr. Imani owes him. In these circumstances, there is nothing on the papers to suggest that this application is anything more than "an elaborate means of execution" (*Gardee v Dhanmata Holdings* 1978 (1) SA 1066 (N) at 1068H).

16 While this does not in itself disentitle Mr. Pillay to relief, it is by no means clear that Mr. Pillay would not be able to achieve his aims by obtaining judgment on the suretyship, and then levying execution in the ordinary manner, or that the respondents' sequestration confers some special advantage to which Mr. Pillay is entitled.

17 I have also had regard to the fact that apparently no steps have been taken to inventory the respondents' assets and creditors since the provisional order of sequestration was granted on 13 September 2021. Had there been a genuine belief that the respondents have a body of assets from which a range of creditors would derive some advantage, I would have expected some steps to establish these particulars to have been taken. None of the respondents' other creditors (if they exist), have made themselves known in response to the dissemination of the provisional order.

18 If more were needed to demonstrate the inadequacy of Mr. Pillay's case in providing reason to believe that sequestration will be to the advantage of the respondents' creditors (it is not), it would be necessary for me to point out that there is no attempt at all in Mr. Pillay's papers to satisfy the requirements of this court's practice manual, which gives detailed guidelines for the evaluation

of whether an advantage to creditors has been demonstrated in any particular case. The principal requirement of the practice manual is that the applicant must set out a calculation which shows that the probable dividend to concurrent creditors of the respondent is in excess of twenty cents in the rand. That has obviously not been done, because Mr. Pillay simply does not allege or prove the material facts necessary to perform the computation.

19 Mr. Pillay's legal representatives were clearly aware of these requirements. Counsel's principal heads of argument in the application for a provisional order reproduce the practice manual's requirements, but they do not attempt to apply those requirements to this case. The heads were not supplemented in anticipation of the application for final relief, and so no argument based on the practice manual guidelines was addressed to me at all.

20 It follows from all of this that I cannot be satisfied, as I am by statute required to be, that there is reason to believe that any concrete advantage to creditors will arise from granting the relief Mr. Pillay seeks. Accordingly, the provisional order of sequestration is discharged and the application for final relief is dismissed with costs.

**S D J WILSON**
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 November 2021.

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| HEARD ON: | 25 October 2021 |
| DECIDED ON: | 15 November 2021 |
| For the Applicants: | RR Kisten<br>(Heads of argument drawn by I Pillay SC and RR Kisten)<br>Instructed by SP Attorneys Incorporated |
| For the Respondents: | N Felgate<br>Instructed by Mashabane and Associates Incorporated |