REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/29582

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

..... 24 June 2021
SIGNATURE DATE

In the matter between:

ENGEN PETROLEUM LIMITED Applicant

Versus

SINGH, VISHAL Respondent

JUDGMENT

MATOJANE J

[1] This is an application for the provisional sequestration of the respondent's estate in terms of s 8 (b) of the Insolvency Act 24 of 1936 ("the Act").

[2] The three main issues are whether an act of insolvency has been shown, whether the sequestration will be to the advantage of creditors and whether the court should exercise its discretion in granting the relief sought.

[3] An interlocutory issue is whether the applicant's application for condonation for the late filing of a supplementary founding affidavit should be granted. I propose starting with the merits as the consideration of the condonation application that also invokes a consideration of the merits.

[4] It is common cause that the respondent is indebted to the applicant in the sum of R48,546,883.15 together with interest thereon at the rate of 10% per annum from 1 October 2018 to the date of final payment.

[5] The applicant caused a writ of execution ("the writ") to be issued against the respondent and served at the registered address of an entity of which the respondent is a director. The sheriff attempted to serve at the premises on four separate occasions without success as it could not be ascertained if the respondent still resides at the premises.

[6] The writ was eventually served on the respondent at his place of employment on 21 May 2019 after leave to serve by way of substituted service, which was granted on 20 July 2020.

[8] The respondent argued two points in this regard. The first was that the *nulla bona* return relied upon by the applicant in the founding affidavit did not prove the Act of insolvency asserted. Second, the respondent disputes the applicant's contention that it has discharged the onus of establishing advantage to creditors in terms of section 10 (c) of the Act.

[9] The return of service reads as follows:

"On this 21" day of May 2019 at 13:17 I served the WRIT OF EXECUTION AGAINST PROPERTY in this matter upon VISHAL SINGH personally at 2 ROBINSON STREET ALRODE ALBERTON by handing to the abovementioned a copy thereof after explaining the nature and exigency of the said process. (Rule 4(1) (a) (i)).

Subsequently, after I demanded payment of the amount due, I was informed by the PARTY SERVED that it was impossible to pay the amount claimed or any sum. Except property exempted by law in terms of Section 39 of Act 59 of 1959, as amended, no property or assets

could, after enquiry, be pointed out to satisfy this writ. Despite a diligent search and enquiry, I could not find sufficient disposable property to satisfy this writ. I, therefore, make a return of NULLA BONA.

Remarks: Ask the debtor to point out assets that belong to him, he informed me that he got no assets. He sign a "Nulla Bona".

[10] Section 8(b) of the Act envisages two separate acts of insolvency. The first is committed when upon demand the debtor is not able to satisfy the judgment and is also unable to indicate sufficient disposable property to satisfy it. The second is where the execution officer is unable to serve the writ upon the debtor personally, and the execution officer is unable to find sufficient disposable property to satisfy the judgment

[11] In his answering affidavit, the respondent alleges, in response to the *nulla bona* return that:

"I admit that the writ was served on me at my place of employment. When the writ was served on me, the sheriff particularly asked me to point out the property owned by me at my place of employment. I responded to the sheriff that I have no assets at such premises. I deny advising the sheriff that I have "no assets" (as is averred in the sheriff's return of service). The sheriff then requested me to sign the *nulla bona*. He failed to explain to me the import of this document and signed it without properly reading or understanding it."

[12] In *Sussman Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) 94 Potgieter J held

'The *onus* is always on the applicant to prove that respondent has committed an act of insolvency. If an act of insolvency in terms of sec. 8 (b) is relied upon the *onus* is discharged if a return is filed which on the face of it is valid and if the facts therein contained are facts which the applicant can rely upon in terms of sec. 8 (b). If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8 (b) have been complied with they were in fact not complied with and that the return is not a proper return. Where, however, the return itself does not show that the requirements of the sub-section have been complied with, then the onus is not shifted, and it rests on applicant to show that in fact the requirements have been complied with and that the return is in fact a *nulla bona* return.'

Do the facts contained in the *nulla bona* return comply with s 8(b) of the Insolvency Act?

[13] An act of insolvency is committed if, as provided for in s 8*(b)* of the Insolvency Act, the court has given judgment against the debtor and he fails 'upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment'.

[14] Applied to the facts of the present matter, the question arises whether the respondent, after personal service on him of the writ, indicated to the deputy sheriff disposable property sufficient to satisfy the judgment debt by informing him of having 'property elsewhere' as well as 'banking accounts.

[15] The return conveys that the respondent had no money or disposable assets at his place of employment. He alleges in his answering affidavit that he responded to the sheriff that he has no assets at such premises. However, he never indicated to the sheriff the nature of the property he asserts he has, its whereabouts, and bank accounts if he has any. In **Wilken and Others NNO v Reichenberg**[1] it was held that the execution officer is merely required to ask the debtor to indicate sufficient property to satisfy the writ and that s 8*(b)* does not impose a duty on the execution officer to enquire from the debtor what property he has and where it is situated. It is for the debtor, the court concluded, to point out the property or indicate its whereabouts and describe it in order to demonstrate its sufficiency[2].

[16] The respondent further alleges that he was made to sign the *nulla bona* return without the sheriff having explained the content thereof to him. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. The principle of the *caveat subscriptor* rule is that one's consent is indicated by one's signature to the document, irrespective of one's true intentions. For this reason, the respondent, a businessman with interests in a number of companies and Close Corporations, cannot succeed in arguing that he did not read what he signed or did not understand the import of the *nulla bona* return.

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[1] 1999(1) SA 852(WLD) at page 858-C

[2] see Mars *The Law of Insolvency in South Africa* 9 Ed para 4.3).

[17] The consequence for this matter is that the respondent's attack on whether an act of insolvency has been shown is not available as the facts contained in the return are facts that the applicant can rely upon in terms of s8 (b) of the Act.

Advantage to creditors

[18] The threshold for advantage to creditors is relatively low in arms-length sequestration. In Meskin & Co v Friedman, Roper J said:

"The phrase "reason to believe", used as it is in both these sections (sections 10 and 12 of the Insolvency Act), indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the courts positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the court must be "satisfied", it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so[3]."

[19] The Constitutional Court in Stratford & Others v Investec Bank Ltd and Others[4] istated that specifying the cents in the rand or a 'not-negligible' benefit to creditors is unhelpful. The court made it clear that the meaning of the term 'advantage to creditors'is broad and should not be approached rigidly[5]. The facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to the creditors[6]. The court need only be satisfied that there was reason to believe, not even a likelihood but a prospect not too remote, that as a result of investigation and enquiry, assets might be uncovered that will benefit creditors.

[20] The respondent's case in its answering affidavit is that the supposition that he is factually insolvent is unsupported by any evidence and that applicant has failed to discharge its onus of establishing that he is, in fact, *de facto* insolvent.

[21] Against this background, the following factors weigh with me. First, the respondent is a registered owner of immovable property, namely unit 9, SS Avonlea

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[3] Meskin & Co v Friedman 1948 2 SA 555 (W) 558, Epstein v Epstein 1987 4 SA 606 (C) 609.

[4] 2015(3)SA 1 (CC)

[5] At para 44

[6] Meskin & Co v Friedman (note 3 above) 558,

Gardens, Oriel. The purchase price of this property is recorded as R90 000.00, and a bond is registered over the property in the amount of R1 600 000.00; there is a prospect that as a result of the investigation, it might be discovered that there is equity in the property that could benefit creditors if the property is sold.

[22] Second, due to lack of information in respect of respondent's financial position, the applicant is not able to substantiate that the sequestration of the respondent will benefit the creditors, however, a trustee, if appointed, will be able to investigate whether the respondent has any claims on loan account against the five companies and close corporations in which he has an interest and whether these companies are his alter ego. The applicant has not annexed any evidence substantiating his income level. He could have provided his returns of income to SARS or other proof of income to refute the nulla bona return and the deeming provisions of section 8(b) of the Insolvency Act.

[23] Third, in exercising discretion, I weigh up the fact that without knowledge of the identity of any other creditors which the respondent may have, the respondent's liabilities to the applicant calculates to R48 546 883.15, exceeds his assets, and he is accordingly *de facto* insolvent.

[24] In my view, the investigation and interrogation of the respondent and witnesses may reveal assets that have been disposed of and, therefore, prove advantageous to creditors.

Condonation for the late supplementary founding affidavit

[25] Approximately two hours before the commencement of the hearing, the respondent's counsel informed the applicant's counsel that he was considering raising a point of law not raised in the founding papers. That the applicant had not, in its founding affidavit, dealt with the requirement set out in section 9(3)(a)(ii), which requires amongst others that the petition for sequestration should state whether or not the respondent is married or not and if so, his marital status.

[26] Having been alerted to the fact, the applicant's attorney of record embarked on searches to be able to comply with the provisions of section 9(3)(a)(ii) of the Insolvency Act, 24 of 1936 ("the Act"). The results of the relevant searches were

recorded in an affidavit in the said attorney's name and uploaded without the leave of the court and the respondent to Caselines.

[27] The supplementary affidavit deposed to by the applicant's attorney advised that subsequent to the disclosure, she carried out a CSi identity verification search which recorded that the respondent was married on 5 August 2015 and that the marital status of the respondent is not stated. She attached a Deed of Suretyship signed by the respondent only.

[28] At the hearing, counsel for the respondent took issue with the fact that the supplementary founding affidavit was uploaded to Caselines without the leave of the court. The respondent submitted that the applicant failed to establish in his supplementary affidavit reasonable steps taken by it to establish the respondent's marital status and has accordingly failed to comply with section 9(3)(a)(ii).

[29] In Khunou & Others v Fihrer & Son[7] 1982 (3) SA (WLD), the court stated the following:

"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society are inextricably interwoven. The Rules of Court are, in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner."

[30] The supplementary affidavit places before the court material evidence that came as a result of notice given by counsel for the respondent two hours before the commencement of the hearing that he intended to argue a point not foreshadowed in the founding papers or his heads of argument. The applicant explains how he cannot establish the respondent's marital status after this issue was brought to his attention. No prejudice to the respondent has been alleged or shown except for a

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[7] 1982 (3) SA (WLD

loss of a tactical advantage. I am satisfied that the respondent has taken reasonable steps to establish the marital status of the respondent without success[8].

I accordingly grant the condonation application with no order as to costs.

ORDER

I thus make the following order:

1. The estate of the respondent is placed under provisional sequestration.
2. All interested persons are called upon to show cause why this Court should not order the final sequestration of the respondent on 10 August 2021 at 10h00 or so soon thereafter as the matter may be heard.
3. The respondent is ordered to disclose his marital status to the applicant
4. The costs of this application are costs in the sequestration of the respondent's estate.

K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

Counsel for Applicant:	Advocate S Aucamp
Attorney for Applicant:	Mathapo Moshimane Mulangaphuma Inc
Counsel for Respondent:	Advocate JL Kaplan

[8] Section 17(4)(b) of the Matrimonial Property Act provides:
"An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him he was unable to establish whether the debtor is married in community of property or the name and address of the spouse of the debtor"

Attorney for Respondent:	Hirschowtiz Flionis