IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 17353/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 13 December 2021

In the matter between: -

CHEMAGIC (PTY) LTD Applicant
(REGISTRATION NUMBER: 2014/171069/07)

and

VAN DER SCHYFF, ROBERT JOHN Respondent
(IDENTITY NUMBER: [....])

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 December 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

Factual Matrix

[1] This is an application for the compulsory sequestration of the respondent's estate in terms of section 8(b) of the Insolvency Act, 24 of 1936 (*"the Act"*). The alleged act of insolvency invoked is an inadequately fruitful sheriff's return rendered upon execution of a writ issued pursuant to a provisional sentence order granted by this Court on 8 November 2018 against the respondent and Techstream Capital (Pty) Ltd (*"Techstream"*), jointly and severally, the one paying the other to be absolved, for payment of the sum of R286,923.99. Both the respondent and Techstream opposed the provisional sentence summons, albeit unsuccessfully.

[2] The movable goods attached by the sheriff on the 20th of December 2018 and removed on the 1st of February 2019, were sold in execution and yielded an amount of R9,878.50. The sheriff's costs amounted to R7,550.21 and accordingly only a net amount of R2,328.29 was yielded from the sale. The respondent therefore remains indebted to the applicant in the amount of R198,595.70, together with interest thereon at a rate of 10 % per annum calculated from 29 August 2018.

Application for postponement

[3] The respondent was represented by attorneys until the 24th of August 2021. A formal notice of withdrawal was filed. Prior to the withdrawal, answering papers and heads of argument were filed on behalf of the respondent. On the morning of the hearing, the respondent appeared in person and applied for a postponement, which was opposed. The respondent's request for a postponement was premised on two grounds, namely: -

> [a] Firstly, that his business had been devastated by the Covid-19 pandemic and national looting which had just occurred at the time and that it required more time to recover in order to enable him to settle his debt with the applicant;

[b] Secondly, the respondent asserted that various employees were financially dependent on the continuation of the business and that a sequestration of his estate would be to their prejudice.

[4] The respondent also recorded that he had made a further payment of R 5 000.00 the day before the hearing towards the settlement of the debt.

[5] Mr Cooke, appearing for the applicant, argued that the respondent's reasons for a postponement were unsubstantiated and dilatory in that the respondent has had ample opportunity to make payment or to at the very least make arrangements to make payment of the judgment debt, but failed to do so. Furthermore, Mr Cooke submitted that the applicant requested a provisional sequestration order which would provide the respondent with a further opportunity to make payment and would obviate the need for a final sequestration order should the debt be settled before then.

[6] As an alternative resort, I encouraged the parties to attempt to find middle ground and momentarily stood the matter down for these discussions to take place. Upon returning to Court, both parties advised that they were unable to meet each other and Mr Cooke therefore requested the matter to proceed.

[7] Having considered both the argument of the applicant and the respondent, I found the reasons for the postponement wanting and I agreed with Mr Cooke that if the respondent were serious in settling the judgment debt, he would make very attempt to do so in due course. I accordingly dismissed the application for a postponement and I requested both parties to address me on the merits of the application.

THE APPLICANT'S CASE

Formal requirements

[8] As far as the formal requirements are concerned, I am satisfied that the applicant has complied with all of them. The applicant's attorney of record, on the court's insistence, deposed to a service affidavit confirming that the sequestration

application was issued on the 17th of July 2020, whereafter a security bond was issued by the Master of the High Court on the 25th of August 2020.

[9] The service affidavit also explains various difficulties experienced in serving the sequestration application on the respondent personally, which ultimately necessitated the applicant to approach the Court for an order for substituted service by way of service on the respondent via e-mail, WhatsApp Messenger and publication in *The Star* newspaper. Service of the application was effected by sheriff on the South African Revenue Services on the 7th of August 2020. A return of non-service on trade unions dated 18 August 2020 was issued and the explanation proffered was that the premises were found to be vacated and locked. The same applies to an attempt to serve the application on employees.

The merits

[10] The respondent's indebtedness to the applicant is not disputed.

[11] The applicant asserts that the sequestration of the respondent would be to the benefit of creditors as the respondent is a director of three private companies, namely: -

[a] Techstream Capital (Pty) Ltd (registration number: 2011/105281/07);

[b] Sikhweni Distributors (Pty) Ltd (registration number: 2017/495304/07);

[c] Mogotsi Sourcing (Pty) Ltd (registration number: 2015/191846/07).

[12] In addition, the applicant relied on the equity in an immovable property owned by the respondent situated at 182 Sunset Boulevard, Sunset Avenue, Lonehill (*"the property"*). The mortgage bond registered over the property was for an amount of R500,000.00 and the property, according to a Lightstone valuation, was valued at R705,600.00.

[13] Accordingly, it was submitted on behalf of the applicant that there was sufficient equity in the immovable property even if the respondent had not reduced his obligations to the mortgagors. The respondent averred that there is every reason

to believe that a trustee would in the course of the administration of the respondent's estate and by invoking the powers to hold enquiries afforded to him/her by the Act, uncover further assets and in particular recover assets belonging to the respondent for the benefit of the respondent's creditors.

THE RESPONDENT'S GROUNDS OF OPPOSITION

[14] The respondent stated that he had not resided at the property, since 7 August 2020 and that he relocated to Cape Town on 18 October 2020. He also stated in his answering papers that the property was sold on the 5th of February 2020, some five months prior to the issuing of the sequestration application. The respondent subsequently relocated to Cape Town on 18 October 2020.

[15] The respondent asserted that the application was a mere stratagem employed by the applicant and more specifically by the deponent to the founding papers, Mr Botha, *in terrorem* to extract payment from the respondent of the remaining balance outstanding in terms of the judgment granted against him and Techstream Capital (Pty) Ltd.

[16] The respondent complained that the applicant failed to take any steps to recover the judgment debt from Techstream whilst aggressively pursuing all remedies against the respondent in his personal capacity.

[17] The respondent, in further support of its defence that the application is an abuse of process, referred to an incident on the 31st of October 2019 when the applicant caused the sheriff to attach movable goods comprising of stock of another separate legal entity, namely Sikhweni Distributors (Pty) Ltd (*"Sikhweni"*). The respondent was required to make payment of a substantial amount of money to the applicant before the applicant agreed to release the attached and removed stock. The business of this separate legal entity, according to the respondent, was seriously compromised as a result and effectively came to a halt as it could not comply with any of the existent orders for the delivery of stock to retailers.

[18] At paragraph 28.2 of the answering papers, the respondent admits that he is

still indebted to the applicant and conceded, although he is not certain of the exact outstanding amount, that the judgment debt has not been satisfied *in toto* and that in accordance with section 8(b) of the Act, it constitutes an act of insolvency.

[19] The respondent admitted that he is a director of three companies mentioned in the founding papers, but stated that Techstream was not trading, that Mogotsi Sourcing (Pty) Ltd was dormant and that his directorship in Sikhweni had no value.

[20] The respondent stated that the Lonehill property was sold for a purchase consideration of R700,000.00 and that after settlement of all debts pertaining to the Lonehill property, a mere R7,465.02 was left. He also stated that he had no other assets and/or investments.

[21] Furthermore, the respondent stated that the applicant has failed to demonstrate that there is reason to believe that it would be to the advantage of creditors should the respondent's estate be sequestrated.

APPLICANT'S REPLICATION

[22] In reply, the applicant denied that the application was made *in terrorem* and stated that it was entitled to a sequestration *ex debito justitiae*. It also stated that it was not obliged to apply for the liquidation of Techstream and that it was entitled to pursue any remedy against the respondent as it advised. In any event, on the respondent's own version Techstream is not trading and it would therefore serve no purpose to apply for its winding-up.

[23] The applicant explained how it came about that the movables of Sikhweni was attached. During October 2019 Mr Botha of the applicant was informed by a colleague in the industry that the respondent was trading from a new premises, however he was not advised that he was trading under a separate legal entity. On the strength of this information a warrant of execution was issued and the sheriff was instructed to attend to the execution.

[24] The applicant pointed out that the respondent failed to elaborate on his livelihood, what income he derived from the three companies and why his solvency

is a prerequisite for earning a livelihood. A trustee, according to the applicant, once appointed, would be empowered to continue with the business of Sikhweni and the respondent would be entitled to remain gainfully employed. The applicant pertinently pointed out that the respondent failed to take the court into his confidence by making a full disclosure of his assets and liabilities.

[25] It is denied by the applicant that Sikhweni has no value as the respondent readily admits that he earns a livelihood from this separate entity. The applicant states that Sikhweni clearly owns substantial assets that the respondent was desperate to release from attachment. Accordingly, the applicant disputes the respondent's denial that there would be no benefit to creditors, more particularly in circumstances where he has failed to make a full disclosure of his assets and liabilities, including bank statements, management accounts of the companies and financial statements.

DELIBERATION

[26] During argument I requested Mr Cooke to address me on the issue of jurisdiction considering the respondent's relocation to Cape Town. In the service affidavit filed subsequently, as well as during argument Mr Cooke referred me to section 149(1)(b) of the Act, which confers jurisdiction on a Court in respect of any debtor who: -

> *"At any time within 12 months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court."*

[27] The application was issued on the 17th of July 2020 and the respondent on his own version relocated to Cape Town on the 18th of October 2020, which is a period less than 12 months as prescribed by the Act. I am therefore satisfied that this Court has the requisite jurisdiction to determine this application.

[28] There are two related questions relating to the applicant's claim. The first is whether the applicant has established its claim on a *prima facie* basis, i.e. whether

the balance of probability on the affidavits is in its favour in that regard[1]. If that question is affirmatively answered, the further question is whether the applicant's claim has been shown to be *bona fide* disputed on reasonable grounds, in which case sequestration proceedings would be regarded as inappropriate.[2]

[29] From the facts stated above, it is common cause that the applicant has complied with all of the formal requirements of the Act. It is also not in dispute that at the time when the application was launched, the applicant was a creditor in the amount of more than R100.00. It is also not disputed that the applicant is still a creditor of the respondent and that the amount remains unpaid. I also take cognisance that the capital amount must have increased due to the interest calculation and costs awarded in the provisional sentence proceedings.

[30] In *Meskin & Co v Friedman*[3] Roper J stated: -

> *"Section 10 and 12 of the Insolvency Act, 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under s 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under s 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, 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 Court a 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."*

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1 Section 10(1) of the Insolvency Act, 24 of 1936.
2 *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO intervening)* 1998 (2) SA 208 (C) at 218D - 219H.
3 1948 (2) SA 555 (W) at 558 to 559.

[31] Further, Roper J stated: -

> *"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 will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."*

[32] This decision was also echoed in *Nedbank Ltd v Groenewald*[4] and afterwards this approach was also followed by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others.*[5]

[33] The following passage taken from *FirstRand Bank Ltd v Evans*[6] is also instructive: -

> *"[If] the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the Court should ordinarily grant the order. It is for the respondent to establish the special circumstances that warrant the exercise of the Court's discretion in his or her favour."*

[34] The special circumstances that the respondent is relying on are that the applicant has instituted the application for some ulterior purpose to enforce payment of a claim and not to benefit the respondent's creditors.

[35] The respondent's factual substratum that the application is an abuse of process and that there would be no advantage to creditors does, in my view, not rise to the level constituting a reasonable *bona fide* dispute. The applicant has clearly explained why it attached the goods of Sikhweni during October 2019 and it is clear from the replying affidavit that the applicant's allegation that all of the goods that were attached were that of Sikhweni is highly questionable in circumstances where a WhatsApp exchange between the respondent and the applicant's attorneys reveals

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4 2013 JDR 0748 (GNP).
5 2015 (3) SA 1 (CC).
6 2011 (4) SA 597 (KZD) at [27].

that only certain items attached belonged to Sikhweni and that the remainder of the stock was owned by Techstream.[7]

[36] It is of some concern that the property was sold and that the respondent settled other creditors with the proceeds, but not the applicant. Moreover the sale occurred five months before the sequestration proceedings were initiated. This conduct on the part of the respondent justifies an investigation by trustees in my view.

[37] The respondent has failed to furnish any financial statements or bank statements proving his solvency. Furthermore, there exists a valid judgment debt against the respondent. The respondent has made very limited effort to reduce his indebtedness to the applicant and there is no factual evidence before this Court to show that he is capable of making payment of the judgment debt. Accordingly, I am of the view that the respondent has not made out a case why the Court's discretion should be exercised in his favour.

[38] The fact remains that the amount outstanding is not disputed by the respondent. Accordingly, the respondent has failed to convince me that special circumstances mitigating against the granting of a provisional sequestration order exist.

[39] In my view the balance of probability on the affidavits is in the applicant's favour and the respondent has not demonstrated a *bona fide* dispute on reasonable grounds.

ORDER

In the circumstances I grant the following order: -

[1] The estate of the respondent is placed under provisional sequestration.

[2] The respondent and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the Court should not

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7 Replying affidavit, annexure "RA3", p 010-17.

grant a final order of sequestration of the said estate on **14 March 2022** (*"the return date"*) at 10:00 or as soon thereafter as the matter may be heard.

[3] A copy of this order must forthwith be served on: -

[a] the respondent personally;

[b] the employees of the respondent, if any;

[c] all trade unions of which the employees of the respondent are members, if any;

[d] the Master; and

[e] the South African Revenue Service.

[4] In order the secure the return date, the applicant's attorneys must invite the Registrar *via* email at JHBenrolment@judciary.org.za, request that the return date be the date for enrolment, and indicate that the order granted by this Court has been uploaded onto Caselines.

[5] The costs of this application are costs in the sequestration of the respondent's estate.

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: **25 August 2021**
DATE OF JUDGMENT: **13 December 2021**

APPEARANCES:

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