THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 75973 / 2015

DATE OF HEARING: 26 OCTOBER 2016

DATE OF JUDGMENT: 11 NOVEMBER 2016

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

11-11-2016
DATE

SIGNATURE

In the matter between:

CHAPMAN FUND MANAGERS (PTY) LTD First Applicant

CHAPMAN UTILITY MANAGEMENT SERVICES (PTY) LTD Second Applicant

and

RONALD GEORGE PHALA Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION

[1] This is a sequestration application brought by the applicants, more specifically the second applicant, against the respondent. The respondent was the erstwhile managing director of the second applicant (CUMS). The respondent holds indirect shareholding in a company known as Tidal Sea Trading 59 (Pty) Ltd ("Tidal Sea") through shareholding he alleges to hold in Enersec (Pty) Ltd (which allegedly holds the shares in Tidal Sea). Tidal Sea concluded a shareholders' agreement with, inter alia, the first applicant (CFM).

[2] Following the misappropriation of CUMS's funds by the respondent and a company of the respondent, namely Face Languta, CUMS instituted action against respondent and Face Languta under case number 1666/2010 and successfully obtained a judgment for payment of the sums of R45 600.00 and R38 095.36 together with interests and costs in the action and in ensuing the appeal under case number A494/12.

[3] CFM also instituted action against respondent and Tidal Sea under case number 8447/2010. This action was prompted by allegations of misappropriation and/or undue enrichment and breach of respondent's fiduciary duties towards CFM. During the course of the action, CFM obtained the following orders in its favour:

[3.1] a cost order taxed in the sum of R176 212.55.

[3.2] an order in the action pursuant to a judgment granted by Legodi J on 18 September 2015 for payment of the sums of R100 000.00 and R1 150 000.00. Leave to appeal was subsequently granted by Legodi J on 11 November 2015 but the appeal has since lapsed due to the appellants' (respondent's) failure to timeously lodge the record.

[4] The respondent is thus indebted to the applicants as follows:

[4.1] To CFM (under case number 8447/2010) the taxed costs in the sum of R176 212.55.

[4.2] To CUMS (under case numbers 16666/10; SCA 254/2012 (an application for leave to appeal was successfully launched by CUMS and A494/12, i.e. the CUMS matter which was finally resolved on appeal in the Gauteng Division), as follows:

[4.2.1] R45 000.00, being the capital sum of the judgment together with interest at the rate of 15.5% per annum from 17 December 2009. As at 20 August 2015 this amount was R73 461.60; and

[4.2.2] R38 095.36 being the further capital sum in respect of the aforesaid judgment together with interest at the rate of 15.5% from 14 January 2010, which amount was R61 371.62 as at 20 August 2015;

[4.2.3] the taxed bill of costs in respect of the CUMS trial action in the sum of R201 933.52.

[4.2.4] the taxed bill of costs in respect of the CUMS appeals in the sum of R143 355.16.

[5] The respondent total indebtedness is thus R176 212.55 to CFM and R480 121.90 to CUMS, together with further interests and costs incurred in respect of the execution processes.

RESPONDENT'S DEFENCES

[6] The respondent submitted that he relocated to Cape Town in December 2014 and as a result this court does not have jurisdiction to entertain the application.

[7] The respondent submitted that the deponent to the founding affidavit, namely Mr Kruger, is not authorised to instruct the applicants' attorneys to institute these proceedings on behalf of the second applicant.

[8] The respondent submitted that CFM's claim has been extinguished by set-off of a claim of Tidal Sea against CFM.

[9] The respondent thus submitted that the requirements of section 8 (b) of the Insolvency Act have not been satisfied.

JURISDICTION

[10] The respondent is a director of numerous companies, with registered offices either at Greenside, Johannesburg (the respondent's alleged erstwhile residence) or in Sandton. The searches conducted still indicate the respondent's residential address as being No 5, Withered Road, Greenside, which is situated in Johannesburg. From a company and employment perspective the respondent is employed by these companies who are all situate within the jurisdiction of this court.

[11] On the respondent's version he relocated to Cape Town in December 2014. Section 149(1)(b) of the Insolvency Act, No. 24 of 1936 provides the following:

"149 Jurisdiction of the court

(1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-

(a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or

(b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient that the estate of a person domiciled in a State which has not been designated in terms of section 2 of the Cross-Border Insolvency Act, 2000 (Act 42 of 2000), should be sequestrated by a court outside the Republic, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration."

[12] This application was filed with the Registrar of this court on 17 September 2015. It must follow thus that this court does have the necessary jurisdiction to entertain the application because the respondent, in the period of 12 months immediately preceding the lodging of the petition, originally resided within the jurisdiction of the court and the respondent carried on, and still carries on, business within the court's jurisdiction. Meskin Insolvency Law at par 15.1.6.1 provides the following synopses on the application of section 149(1) of the Insolvency Act:

"These concerns with "equity" and "convenience" relate not to the adjudication of the application but to the process of administration of the estate after the grant of the order. The intention is to empower a Court to decline to exercise a jurisdiction technically available where, in the circumstances, it would be appropriate if the sequestration were to occur in another forum, eg, on the date an application is lodged with the Registrar of the Court, the debtor is domiciled in a foreign country and the only ground of jurisdiction is that, fortuitously, movable property owned by him is situated in its area of jurisdiction; or on such date the debtor is ordinarily resident in the area of jurisdiction of the Court but, in fact, only recently has become

so resident and became insolvent while carrying on business in the area of jurisdiction of another Court in the Republic."

AUTHORITY OF KRUGER TO ACT ON BEHALF OF THE SECOND APPLICANT

[13] Since the respondent was removed as the managing director of CUMS, Kruger took over the relevant tasks and responsibilities pertaining to CUMS. Kruger instructed attorneys to institute the court action under case number 16666/10 and did so, inter alia, on the basis of the authority then given to him by CUMS' board of directors. At the stage of the applications for leave to appeal before the court a quo and before the Supreme Court of Appeal, respondent apparently and unsuccessfully sought to question Kruger's authority and is therefore precluded from again attempting to do so. So it is submitted.

[16] Kruger is the Managing Director of CUMS. This is not disputed by the respondent. He is therefore still authorised to act on behalf of CUMS and to authorise attorneys to institute the present application for sequestration. If the respondent seriously intended to dispute Kruger's authority he should have complied with the relevant rules of court. Streicher JA, in Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624-5, par [19] stated the following:

"In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the

proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See A Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C - J.)"

[17] The respondent did not follow the provisions of rule 7 and this point too cannot be upheld.

CLAIM AGAINST CFM

[18] Whether respondent has a claim against CFM is not relevant to the second applicant to whom substantial amounts are due.

EXECUTION PROCESS AND RETURNS OF SERVICE

[19] The applicants endeavoured to execute on the judgments on several occasions. These attempts have been unsuccessful because the respondent's whereabouts were unknown. When the applicants' attorney

contacted the respondent he refused to provide information of his whereabouts. Correspondence between the applicants' attorneys and the respondent's attorneys at that stage remained unanswered. The respondent was cautioned that service and execution would take place by sheriff at court when the CFM matter was to be heard. At the day of the hearing of the trial in the CFM matter, on 20 August 2015, the Deputy Sheriff proceeded to execute three writs of execution against the respondent in person. The returns contain wording to the effect that:

(i) payment of certain amounts was demanded from respondent;

(ii) respondent was unable to pay the judgment debt and costs in full or in part;

(iii) the returns are one of nulla bona.

[20] The return relied upon stated as follows:

"IT IS HEREBY CERTIFIED:

That on 20 August 2015 at 09h30 at the High Court PRETORIA CNR MADIBA & VERMEULEN STREET, PRETORIA being the place where Execution took place as arranged, payment of the judgment debt in the amount of 73 838.63 and R61 371.62 COSTS PLUS VAT were demanded from MR RONNIE PHALA wherewith to satisfy this warrant. MR RONNIE PHALA declared that he has no money, moveable or disposable property wherewith to satisfy the said warrant. No moveable or disposable property was pointed out to me, or could after a diligent search and enquiry be found at the given address. It is further certified that he was requested to declare whether he owns any immovable property which is executable, on which the following reply was furnished. "No.

That simultaneously with the execution, a copy of the warrant of execution was served by handing it to MR RONNIE PHALA personally after the original document was displayed and the nature and contents thereof explained to him. Rule 4[1](a)(i).

THUS MY RETURN IS ONE OF A NULLA BONA"

[21] The warrants of execution were served upon the respondent at court. The respondent contended that this was irregular and contrary to the provisions of rule 45(1).

Rule 45(3) provides as follows:

"(3) Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached), and there-

(a) demand satisfaction of the writ and, failing satisfaction,

(b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,

(c) search for such property.

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of subrule (5), shall be taken into the custody of the sheriff: Provided-

(i) that if there is any claim made by any other person to any such property seized or about to be seized by the sheriff, then, if the plaintiff gives the sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof, the sheriff shall retain or shall seize, as the case may be, make an inventory of and keep the said property; and

(ii) that if satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff shall give to the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts are unknown."

[22] The respondent has not made any attempt to have the warrants or the attachments set aside. In Wilken NNO v Reichenberg 1999 (1) SA 852 (W) at 858I it was held that that it could not possibly have been the intention of the Rule to disallow personal service in circumstances where the debtor was not at his home or at his place of employment or business. Goldstein J stated as follows at 858-859:

"What the Rule allows is service at such places in the absence of the debtor. The Rule even allows service at some other location if the assets to be attached are there and presumably if the debtor is not. It would be absurd, however, to deduce from these provisions that the best of all service, namely personal service, was being sanctioned only if the debtor was at one of the places mentioned in the Rule and was

otherwise not to be permitted. If this were so a debtor attempting to evade his creditor and having left all addresses known to the latter could not be served with a writ under Rule 45(3) if he were found staying temporarily in an hotel as the respondent says was the case with himself."

[23] The warrants were accordingly properly executed at court. The respondent further contended that the nulla bona returns are invalid because the requirements of section 8 (b) of the Insolvency Act were not complied with. In this regard the respondent argued that the sheriff "...*demanded immediate payment of the debt. He asked me if I had assets with me to pay the debt. He did not ask me to indicate sufficient property to satisfy the debt.*" In terms of section 8 (b) of the Insolvency Act a debtor commits an act of insolvency:

"if a court has given judgment against him 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."

[24] Section 8 (b) requires personal service only and it does not state where such service has to take place. It is trite that section 8(b) contains two acts of insolvency, the first being personal service and the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it, and the second being where personal service does not take place and a search by the officer fails to produce sufficient disposable property to satisfy the judgment. In this case there was personal service. See Hocklys Insolvency Law, by P.

Sharrock, Juta Law Books, 9th Edition, 2012 and Dicks v Marais 1952 (3) NPD 165. There was accordingly no obligation upon the sheriff to conduct a diligent search to find sufficient disposable property. It was incumbent upon the respondent to have indicated not only the nature of the assets but also their whereabouts, if there were any, had he wished to avoid the possible consequences which may flow from a nulla bona return.

[25] The word "indicate" in section 8 (b) means that the debtor should tell the officer executing the writ what the property is and where it is. He should do so with sufficient particularity to enable the officer to attach and sell the property. The respondent failed to do so. The respondent alleged in his answering affidavit that if the sheriff had asked him the questions reflected in the return he would have pointed out, at his home address, two motor vehicles which he conservatively estimated to be worth R200 000.00 and that he has cash of around R500 000.00 in a bank account. The identity of the bank where such monies were deposited remains a mystery.

[26] The respondent opportunistically, in my view, alleged that he did not tell the sheriff that he had no assets but told the sheriff that he did not have assets with him at court. I am satisfied that the sheriff's conduct was in order and that the respondent is playing on words to escape the inevitable. The respondent contended that the reason why he has not paid the CUMS judgment debts to date is because he "*believed that this would be part of an overall settlement of the disputes between the parties once the trial action with the first applicant has been finalised*". The respondent does not indicate

what detail, if any, of any discussions, dates, persons involved or written communication had been provided to substantiate this statement. There is nothing contained in the papers to the effect that any of the proceedings or judgments would have been held over pending a settlement.

INSOLVENCY AND CONCLUSION

[27] The respondent has indeed committed an act of insolvency which entitled the applicants to launch the sequestration proceedings. The requirements for the compulsory sequestration of the respondent's estate have been satisfied. The sequestration of the respondent's estate would clearly be to the advantage of creditors. The respondent submitted that he has no other creditors and that the applicants are the only creditors. On the respondent's version he has assets and it thus appears likely that the second respondent will receive a dividend. There may very well be further assets that may come to the fore after sequestration.

SERVICE OF THE APPLICATION

[28] The last point raised by the respondent warrants discussion. The respondent submitted that the application has not been served upon his domestic assistant and therefore there is no compliance with section 9 (4A) of the Insolvency Act 24 of 1936. The respondent relied upon the decision of Stratford and Others v Investec Bank Limited and Others 2015 (3) SA 1 (CC)

wherein it was held that for purposes of the Insolvency Act 24 of 1936, section 9(4A) thereof, the word "employees" includes domestic employees.

[29] Section 9(4A)(a) provides:

"When a petition is presented to the court, the petitioner must furnish a copy of the petition—

(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(ii) to the employees themselves—

(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii) to the South African Revenue Service; and

(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it."

[30] In EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd [2013] ZASCA 167 the court held that "whilst the obligation to furnish the application papers to the employees is peremptory, the modes of doing so indicated in the section are directory and alternative effective means may be adopted. In other words the methods for furnishing employees with the application papers as set out in section 346(4A)(a)(ii) are no more than guides." (Emphasis added)

[31] The question is however whether the failure of the applicants to have served upon the respondent's domestic servant, if any (it remains unknown) precludes an order of sequestration. In EB Steam, Wallis JA stated the following:

"[24] That leaves one final question, namely whether the inability of the applicant, for whatever reason, to furnish the application papers to the employees before the hearing precludes the court from granting any relief. Certainly the failure to provide a security certificate in terms of s 346(3) or the failure to lodge the papers with the Master in terms of s 346(4) is fatal to the grant of immediate relief. However, that is because of the nature and purpose of these requirements. To permit an application for winding-up to proceed without security having been furnished may result in costs being incurred, including by public officials, without any means of recouping them. As the Master is the person who will have to oversee the winding-up there are obvious reasons for ascertaining in advance whether the Master is aware of reasons why a

winding-up order should not be granted. The position in regard to the notification provisions in s 346(4A) is different. Their purpose is to ensure that certain specified persons, who may have an interest in the winding-up, in order to protect their own interests, are, so far as reasonably possible, furnished with the application papers in order to assess their own position in the light of the case made by the applicant. They may well applaud and support the application as did some of the employees in Hendricks.

[25] The fact that the requirement that these persons be furnished with the application papers is peremptory means that it is not permissible for the court to grant a final winding-up order without that having occurred. Does that mean that it is equally impermissible for the court to grant a provisional winding-up order? In my view it does not. The position may well be that an overwhelming case is made on the papers for the grant of a winding-up order and that any delay will allow assets to be concealed or disposed of to the detriment of the general body of creditors and particularly the employees and SARS, who may have preferential claims. It would be absurd to hold that the court was disabled from granting a provisional order merely because it had not been feasible, possibly as a result of the conduct of the employer, to furnish a copy of the application papers to the employees or a representative trade union or even SARS, although the latter is unlikely to be a practical problem."

[32] In the premises I deem it appropriate to make the following order:

[32.1] The estate of the respondent is placed under provisional sequestration in the hands of the Master of the High Court.

[32.2] The respondent and any other interested parties are called upon to advance reasons, if any, why the court should not grant a final order of sequestration of the respondent's estate on 19 JANUARY 2017 at 10:00 or as soon thereafter as the matter may be heard.

[32.3] A copy of this order must be served on:

[32.3.1 the respondent; and

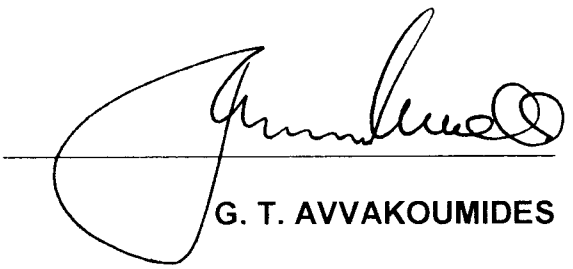
[32.3.2] any trade union referred to in section 11(4) of the Insolvency Act No 24 of 1936 (if applicable);

[32.3.3] the respondent's employees (if any) by affixing a copy of the petition to any notice board to which the employees' have access inside the respondent's residence or other premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the respondent conducted any business or at his residence, as the case may be, at the time of the presentation of the petition; and

[32.3.4] the South African Revenue Services and the Master of the High Court.

[32.4] This order must further be served upon to any known employees, and to every registered trade union, as far as it can be reasonably ascertained, representing any of the respondent's employees, in the manner as provided in section 9(4A) of the Insolvency Act No 24 of 1936.

[32.5] This order must also be advertised in the Beeld and in the Cape Argus no later than 10 days before the return date of this sequestration application.



G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 11 NOVEMBER 2016

Representation for Applicants:

Counsel:	A. M. Heystek
Instructed by:	Stéfan Swart Attorneys

Representation for Respondent:

Counsel:	J. P. Van Den Berg
Instructed by:	Thabiso Maseko attorneys