REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 17571/2015

DATE: 4/3/2016

SHACKLETON CREDIT MANAGEMENT (PTY) LTD	**APPLICANT**
AND	
REXON KHEGELE MASHABANE	**FIRST RESPONDENT**
BONGEKA ADELAIDE MASHABANE	**SECOND RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] This matter came before me as an opposed application for a final sequestration order of the respondents who are married to each other in community of property.

[2] On 16 May 2012 BMW Financial Services obtained summary judgment against the first respondent as well as a corporate entity known as Harraxel Enterprises CC. The order stated that judgment is granted against both jointly and severally, the one paying the other to be absolved.

[3] On 11 October 2012 BMW Financial Services ceded its right, title and interest to the claim to Shackleton Credit Managment (PTY) Ltd, applicant in these proceedings. An attempt to execute against the first respondent yielded a *nulla bona* return on 4 December 2014. I interpose to indicate that the execution proceedings were in the name of BMW Financial Services.

[4] On 10 March 2015 an application for sequestration was launched against the respondents. It served before court on 22 April 2015, on which day a provisional sequestration order was granted returnable on 5 June 2015. The sequestration proceedings were instituted in the name of Shackleton Credit Management (PTY) Ltd to whom the rights, title and interest to the claim had been ceded by BMW Financial Services who had obtained summary judgment.

[5] On the return date, the respondents appeared in court with their legal representatives and sought a postponement so as to be able to file opposing papers. Their request was acceded to. It was ordered that they file their opposing affidavits by 19 June 2015. It was further ordered that the respondents pay the costs of the postponement jointly and severally the one paying the other to be absolved. The provisional sequestration order was extended to 22 July 2015. Both respondents failed to file their opposing affidavits as ordered.

[6] The return date was extended a few more times until this matter came before me in the opposed motion court f9r the week of the 25 to 29 January 2016. I heard the application on 26 January 2016 and extended the return date until this judgment is delivered.

[7] The applicant bases the application for sequestration of the respondents on an act of insolvency. The applicant contends that there was a warrant of execution served on the first respondent personally which yielded a *nulla bona* return (my emphasis). This, the applicant submits, is an act of insolvency as contemplated in section 8(b) of the Insolvency Act.

[8] Further, in an endeavor to show that there is some advantage to creditors, the applicant discloses that two things were done;

8.1 A Windeed search was conducted to determine if the respondents were members of any close corporation or directors of companies. The results were to the effect that the first respondent was a member of nine close corporations and a director of two companies. Four close corporations and one company were found to be in business.

8.2. Another Windeed search in respect of property ownership was undertaken. The result thereof was that one of them, Makolele Business Enterprises CC, owned immovable property known as […], Pretoria. The first applicant was found to be the only member of the Close Corporation.

[9] The applicant was able to establish that there is a bond registered over the property in favour of Nedcor. Further, that although the registered bond was for the sum of R447 662-00, the applicant was of the view that the estimated value of the property was between R680 000-00 and R819 000-00 and that a trustee, in the event one is appointed, would be able to yield a dividend that would be to the advantage of creditors.

[10] In their opposition the respondents have raised four points *in limine.* The second respondent has raised other points as the basis on which the application is opposed. I will deal with them in some detail below. The points *in limine* raised are as follows;

10.1. That since judgment was obtained in the name of BMW Financial Services and subsequently ceded to Shackleton Credit Management, the applicant, there was an obligation to launch an application of substitution. The right of the applicant to proceed in their own name in these proceedings is disputed.

10.2. That the applicant should have first executed against a co-defendant, Harraxel Enterprises, in the summary judgment application. Further, that the company, which has a substantial interest in this matter, has not been joined in these proceedings.

10.3. That the applicant has not complied with the provisions of section 9 of the Insolvency Act 24 of 1936, in that a certificate of security signed by the Master, has not been obtained.

10.4. That a close corporation, Makolele Business Enterprise CC, of which the first applicant is the sole member, and which owns immovable property known as […], Pretoria, has not been joined in these proceedings and further that these papers have not been served on it.

[11] The first respondent further denies that he signed the lease agreement which is the subject matter of the cause of action and sits at the center of the dispute between the parties, further that he was not aware that a business associate of his had sought and obtained vehicle finance without his

knowledge. On the other hand the second respondent's defence is that when the lease agreement in respect of the motor vehicle was entered into, she was no longer living with the first respondent and further she is of the view that her consent was required.

[12] The issues for determination are twofold;

12.1. Whether the raised points *in limine* are sustainable;

12.2. Whether a proper case has been made for a final sequestration order.

[13) When the provisional sequestration order was granted, it was common cause that the first two requirements for a sequestration order had been met, namely, the petitioning creditor's claim was established and the debtor had committed an act of insolvency or was insolvent. The applicant based its application on the fact that there had been a *nulla bona* return. Then, as now, the element in dispute between the parties was whether it would be to the advantage of the creditors if respondent's estate was sequestrated. In seeking a final order a petitioning creditor must establish the same three elements but, however, whereas a provisional order can be granted where the Court is *prima facie* of the opinion that such elements have been established, a final order will only be granted where the Court is satisfied that these elements have been established. Failing such proof it must dismiss the

petition for final sequestration or require further proof of any such element and postpone the hearing to that end.

[14] However, the test to be employed is a secondary requirement regard being had to the fact that there are points *in limine* to be given attention.

FAILURE TO SUBSTITUTE APPLICANT

[15) The respondents hold the view that in light of the fact that judgment was obtained in the name of BMW Financial Services, the applicant, *in casu,* ought to have applied for an order substituting it in these proceedings. The result of the respondents grievance, is that the *locus standi* of the applicant is placed in dispute. The respondents contend that the applicant should have proceeded in terms of Rule 15 which provide that;

> *"(1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished."*

The rule in my view caters for and contemplates a scenario different to the one encountered in this matter. The rule identifies death, marriage and "other change of status of any party". It is clear that in this matter we are dealing with neither death nor marriage. What remains is to determine if there has been a "change of status of a party". A cession does not amount to a change in status as contemplated in Rule 15. It is my view that Rule 15 does not find application.

[16] The respondent further relies on a *dicta* from an old Cape decision of ***Guinsberg & Pencharz v Associated Press.*** I was referred to the following excerpts on page 157;

> *"..... The general rule, of course, is quiet clear that any right of action* may be ceded, and the authorities are also clear that amongst rights *which can be ceded are judgments ..... but the best exact process by which execution can issue by the cessionary has not been settled*
>
> *.....The provision, however, in Sande apparently is that application should be made to the judge,* so *that leave may be granted to issue execution, and that* seems *to me on the whole the right procedure. I do not think it is the right proceeding- it certainly* was *not the proceedings contemplated under Roman Dutch law, that the cessionary should be able to go and, without any reference to the judge, have a writ of execution issued in his own name or using the name of the original claimant.* "

The respondents make the point that there is uncertainty in this area of the law. Not according to the applicant. The applicant referred me to ***Byron v Duke Inc 2002 (5) SA 483 (SCA)*** from which it is clear that that our procedural law permits a cessionary of a judgment claim to obtain a warrant in the name of the cedent. The following *dicta* by Zulman JA, is apposite;

> *"First, where a judgment creditor has ceded his rights it is not absolutely necessary for the cessionary to obtain his substitution on*

the record before he may sue out a *writ in the name of the cedent.*

De Villiers J in Schreuder v Steenkamp 1962 (4) SA 74(0) *at 76H put the matter in these brief terms:*

> " *Volgens die outoriteite is dit egter nie nodig vir 'n sessionaris om die naam van die sedent met sy naam te laat vervang nie: hy kan 'n lasbrief uitneem in die naam van die sedent."*

Besides the aforegoing, a simple narration of the history, in my view, puts paid to the contention that substitution was a necessity and therefore failure to do so is fatal to the application. These are sequestration proceedings. It is a matter of record that a judgment was obtained, an asset was attached and sold in execution and that the first respondent was pursued for the balance. In the process of seeking to recover the balance, a *nulla bona* return was rendered. In separate proceedings, the applicant launched an application for the sequestration of the applicants. In the sequestration application the applicants sketch the history of the matter as well as circumstances of the act of insolvency relied upon. This being a new cause of action and provided the history of the matter which include the cession is laid bare, and also in light of the aforementioned authorities, I do not find it necessary for the applicant to apply for substitution. Consequently this point *in limine* must fail.

EXECUTION AGAINST A COMPANY

[17] The first respondent contends that since judgment was obtained against himself as a well as Harraxel Enterprises CC, the applicant was under

obligation to seek to recover the judgment amount from Harraxel Enterprises CC before pursuing him. Further that the nonjoinder of Harraxel Enterprises CC, who has a substantial interest in these proceedings, is fatal to this application. The first respondent however does no end there, he goes further to make allegations of fraud, harassment as well as Constitutional violations. There are serious flaws in the first respondents submissions. Those being the following;

17.1. The submission by the first respondent that Harraxel should have been contacted first with a view to seek to recover the judgment debt, is baseless. For the simple reason that the judgment was obtained against both the first respondent and Harraxel "jointly and severally, the one paying the other to be absolved". Any creditor is within his or her rights, where there are co-debtors, to pursue payment of the debt against any of the co-debtors. There is no obligation on the creditor to pursue each co-debtor for his or her portion of the joint debt. Any of the co-debtors who ends up paying has a claim against his or her co-debtors for their portions of the debt. This is trite.

17.2. The second point the first respondent makes is that Harraxel has a substantial interest in these proceedings and therefore should have been joined. Bearing in mind that this is an application for the sequestration of the respondents, it is puzzling why the first respondent would be of the view that a Close Corporation of which he is a member should be joined in an application for his sequestration.

17.3. The first respondent makes bald allegations that the applicant is harassing and oppressing them in an unconstitutional manner. What is lacking are details of such harassment and/or oppression. Further, an allegation is made that fraud is prevalent in this matter. I can only surmise that the first respondent is referring to the alleged involvement of Mr. Muhanganei. His involvement is canvassed in detail in the papers. For purposes of the point *in limine* his involvement is irrelevant.

MASTER'S CERTIFICATE

[18] Whereas the first respondent had raised a point that the master's certificate had not been filed, in argument before me counsel for the respondent, correctly in my view, conceded that there was a certificate filed and that the point is abandoned.

THE MATRIMONIAL PROPERTY ACT

[19] The second respondent opposes the application on two grounds;

19.1. That on the 7 February 2002 she was, without her knowledge, resigned as a director of Harrexel. Further, that during 2007 the first applicant, with whom she is married in community of property, left the common home and they have not been staying together as husband and wife since that time. Although still legally married, communication was lost between the two of them and that such loss of

communication persists to this day. The point being made is that when the BMW motor vehicle was purchased or when the first respondent signed as surety, she was no longer staying with the first respondent as husband and wife.

19.2. That the first applicant, as they were legally married at the time the surety was signed, ought to have obtained her consent in accordance with the provisions of section 15(2)(h) of the Matrimonial Property Act. The section provides as follows;

> ***15. Powers of spouses***
>
> *(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.*
>
> *(2) Such a spouse shall not without the written consent of the other spouse -*
>
> …….
> …….
>
> *(h) bind himself as surety.*

[20] The applicant attacks the point *in limine* on two fronts. Firstly, on the basis that the first respondent signed as surety in the normal course of his trade, business or profession. Therefore, so it is argued, the provisions of

section 15 do not apply. Secondly, that in terms of the provisions of section 15(9), where a party does not know or is not reasonably expected to have known, that a transaction is without the requisite consent, the consent is deemed to have been given. The aggrieved spouse will have recourse in the joint estate. On the one hand section 15(6) provides that;

> *"(6) The provisions of paragraphs (b), (c), (f), (g) and (h)of subsection* (2) do not apply where an act contemplated in those paragraphs is performed by *a* spouse in the ordinary course of his profession, trade or business. *"*

On the other hand, the provisions of section 15(9) are as follows;

> *(9) When* a *spouse enters into* a *transaction with* a *person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and -*
>
> *(a)* that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;
>
> *(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has*

been suspended, as the case may be, and the joint estate suffers a *loss as* a *result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.*

[21] The two lines of attack by the applicants are in my view dispositive of the defence of the second respondent. However those must be looked at closely in context. The first applicant describes Mr Muhanganei, whom it is alleged fraudulently purchased the motor vehicle from BMW Financial Services as "a *Trucking Transport Contractor and business associate".* The first respondent also confirms that he knew Mr Muhanganei and trusted him well enough to allow him free access to his office. The posture that the first applicant takes infers that Mr Muhanganei, who was his business associate with clear and free access to their offices, unbeknown to him, gained access to information and documents. Armed with these, he managed to approach BMW Financial Services and purchased a motor vehicle. He also managed to sign on behalf of the first applicant as surety or to put it differently somehow misrepresented himself to BMW, which misrepresentation has left him having to fight off liquidation proceedings. I shall later deal with the relationship between the first applicant and Mr Muhanganei when I consider opposition of the application on the merits.

[22] *In casu,* it is more than plain that the first respondent signed and when he signed the deed of suretyship and bound himself as surety and co- principal debtor for amounts owed to the applicant by the first respondent, did so in the ordinary course of his business. See ***Amalgamated Banks of South Africa Bpk v Goede en 'n Ander 1997 (4) SA 66 (SCA).*** **(**cf ***Nedbank Ltd v Van Zyl 1990 (2) SA 469 (A),*** where it was the wife who stood surety for the debts of her husband in a marriage in community of property.) The defence raised by the second respondent to the effect that she had been married at the time and that her consent was not obtained, is not available to her in circumstances where a party, BMW, did not know that consent was necessary or is not reasonably expected to have had such knowledge. This is so because the application for finance presented to BMW stated that the first respondent was not married. The form shows that on completion thereof he stated that he was single. In applying the reasonable man test, BMW could not have known in these circumstances. See ***Distillers Corporation Ltd v Madise 2001 (4) SA 1071 (0)*** and ***Strydom v Engen Petroleum Ltd 2013*** **(2) SA 187 (SCA).**

THE INSTALLMENT SALE AGREEMENT AND SURETYSHIP

[23] According to the applicant the first respondent presented a whole lot of documents when applying for vehicle finance some of which are the following;

- First applicant's ID,
- Harraxel CK2 Certificate,

- Harraxel financial statements,
- Harraxel bank statements,
- Insurance confirmation form,
- Debit order confirmation form,
- Harraxel resolution,

The documents listed above are of such a nature that whoever procured them for purposes of presentation to BMW, must have had serious criminal intent, if the version of the first appellant is anything to go by. Financial institutions need current and mostly confidential information for purposes of vehicle finance approval. Any business person who becomes aware that their confidential information was effectively stolen and presented, fraudulently, to a banking institution will first and foremost open a criminal case. Surely fraud would have been easy to prove with Mr Muhanganei as the prime suspect.He had access to the premises, he possessed the ill gotten loot, his entity instructed a firm of attorneys to defend summary judgment proceedings and paid a deposit towards that end and he returned the vehicle to the first applicant when it was sought for repossession. The first respondent, despite all the criminality involving his name and that of his his entity, and further despite, as he says in his affidavit, *"sharing a deep concern over the entire* saga", did nothing of that sort.

[24] At first the monthly instalments would have been paid by Herraxel, in terms of the documents supplied during the application for financing. It is not clear from the papers whether the first few instalments went though the bank account of Harraxel. What is alleged is that on 20 August 2009 the debit order instruction was changed so that Tshifs Transport, Mr Muhanganei's entity, would be responsible for payment of the monthly instalments. What I find painfully lacking in the first respondent's affidavit is a clear and unequivocal statement that "my signature has been forged" or "it is not me who signed the application for finance". When one considers the fact that the vague denial of the first applicant is contradicted by the second respondent who states in her affidavit that she was told by the first respondent that he, first respondent, bought the vehicle (my emphasis), for a friend who did not enjoy a good credit record, it muddies the first applicant's allegation of fraud.

[25] When one considers the claim by the first applicant to the effect that he was too far away from the place where the Installment Sale Agreement was concluded, therefore it is impossible that he could have been able to do so. Further, if one considers the allegation by the first respondent that someone, other than him must have signed the agreement, without the benefit of context of the matter, then in that event one would be forgiven for thinking that the first respondent is a victim of an elaborate fraudulent scheme of which he had been totally unaware and from which he never derived any benefit. On his version, first respondent was approached during 2010 by

tracers who inquired about the vehicle. He knew nothing of it and told them that much. He was approached the second time and this time around he was provided with copies of documents. First applicant does not state what those documents are, however one can assume that it was the documents dealing with the financing of the vehicle and the purchase thereof by Harraxel. Even after the second approach, the first applicant told them he had no knowledge of what they were talking about.

[25] Co-incidentally, around that time he was getting notices of speeding violations and again thought nothing of them save that he was of the view that the traffic authorities were mistaken in sending the notices to him. When he saw one of the traffic notices it occurred to him that Mr Muhanganei was driving a similar motor vehicle. He tried making contact with him unsuccessfully. The strange co-incidence is that he had been contacted much earlier by a tracer employed by BMW, as early as July 2010, and according to Ms. Wassermann, acknowledged indebtedness, admitted that he had placed the motor vehicle in the hands of a third party and made an undertaking to pay. In light of this and the fact that according to the second respondent she had been made aware that the vehicle was purchased for a friend, the allegations of fraud made by the first applicant are rejected. In any event and most importantly, the first respondent does not deny signing the deed of suretyship being the foundation of the judgment obtained.

FINAL SEQUESTRATION

[26] Applicant founded its case for a final order of sequestration, on the dictum in ***Commissioner SARS v Hawker Air Services (Pty) Ltd; In re Commissioner for, SARS v Hawker Aviation Services Partnership and others [2006] 2 All SA 565 SCA*** at para [29], namely, that a benefit to creditors is established where the Court is satisfied *"only that there is reason to believe - not necessarily* a *likelihood, but* a *prospect not too remote - that as* a *result of investigation and inquiry assets might be unearthed that will benefit creditors".* That dictum was in turn based on findings in ***Meskin and Co v Friedman 1948 (2) SA 555 (W) at 559*** and ***Dunlop Tyres (Pty) Ltd v Brewitt [1999] 2 SA 580 (W) at 585.*** The inevitable question is whether applicant has managed to satisfy the Court that there is reason to believe that as a result of investigation and inquiry, assets might be unearthed that will benefit creditors.

[27] The applicant argues that;

27.1. The first respondent is the sole member of Makolele Business Enterprise CC;

27.2. Makolele Business Enteprise CC owns immovable property situated at Portion […], Pretoria;

27.3. A bond was registered over the property in 2008 for the sum of R447 662-90;

27.4. The estimated value of the property is R680 000-00 and has

appreciated to as much as R 810 000-00;

27.5. A trustee will be better suited to make a determination whether to sell the property, to yield maximum benefits for creditors or to deal with it as he deems fit for the benefit of the creditors, having established among others, if there are loan accounts due to the first respondent.

[28] In ***Lynn & Main v Naidoo and,Another 2006 (1) SA 59 (N),*** Tshabalala JP, quoted with approval the following at paragraph 39;

" *I agree with Mr. Harcourt that evidence that there is a matter for investigation or enquiry by* a *trustee can be an advantage to creditors. Indeed, that* is *what BOTHA JP said in* ***Lotzof v Raubenheimer 1959(1) SA90(0).*** *He said at 94A-B:*

> *"The fact that the debtor has no assets or not sufficient assets to pay the costs of administration is generally sufficient proof that sequestration would not benefit creditors ..... That however is not always the case, especially where* a *reasonable case has been made out on the papers for an inquiry into the debtor's affairs which may be beneficial to the creditor's interests."*

See also ***Stockowners Cooperative v Rautenbach 1960(2) SA 123*** (E) **at 128 F and v** Chenille Industries v Vorster 1953(2) SA 691 (0) ***at 699 F - H."***

[29] The first respondent does not deal in his papers with the contention by the applicant that an enquiry into their affairs will be of benefit to creditors. Further, the respondents do not deal with the remoteness or otherwise of the possibility of pecuniary benefit for creditors. The approach of the first respondent is that searching for assets is ill advised and that, as argued during the points *in limine,* certain parties ought to have been joined in these proceedings. The above refutation is coupled with the contention, which is a thread running through the first respondents submission, that the entire transaction is laced with fraud therefore by extension these proceedings are tainted.

[30] In my view, the applicant has identified a substantial asset which may be of some pecuniary benefit to creditors. Such a prospect, is in my view, not too remote. The applicant has done more than to merely allege that there could be assets and that trustees, through powers bestowed on them, will be able to do more. The applicant has been able to make a reasonable case that creditors will be benefited and that what may be yielded will not be a negligible dividend.

ORDER

[31] I therefore make the following order;

1. The four points *in limine* are dismissed,

2. A final sequestration order in respect of Rexon Khegele MASHABANE, ID: […] and Bongeka Adelaide MASHABANE, ID: […], is granted,

3. The costs hereof will be costs in the sequestration.

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SA THOBANE
ACTING JUDGE OF THE HIGH COURT