IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 60296/2013

On: 21 January 2016
Before: The Honourable Justice Holland-Milter AJ.
In the matter between:
CHRJSTIAAN STANDER Applicant

and

JAKOBUS VAN DEN BERG (ID:…) Respondent
(Married out of community of property)

JUDGMENT

---

[l] This is an application by the applicant for the sequestration of the respon- dent's estate. The application was served inter alia publishing the applica- tion in the Citizen newspaper and Pretoria News newspaper in terms of a court order granted on 28 May 2014. See p 77 and p 80.

[2] The matter was heard on 17 November 2015, and I reserved judgment because I only received the matter the previous day due to the Judge who was allocated to hear the matter became ill on the 16th.

[3] The basis for the application by the applicant is that he avers that the re- spondent is factually insolvent and unable to pay his debts. The applicant's claim against the respondent is

based on an settlement agreement between the parties made an order by this court on 9 November 2012. See annexure "CS-2" on p 26. The amount due to the applicant by the respondent in terms of the settlement agreement is R 937 000,00.

[4] The applicant now alleges that the respondent has failed to make any pay- ment in terms of the court order.

[5] The applicant attempted execution against the respondent without any result. For purposes of this judgment I deem it not necessary to repeat the alleged attempts as averred in par 6 on p 13 to 19 of the founding affidavit.

[6] The respondent admits the settlement and subsequent court order, but avers that he was then in the process of listing a company, the result of the listing would have resulted in him to settle the judgment debt. See par 8 on p 100.

[7] It is therefore clear that the respondent admits being indebted to the appli- cant.

[8] The respondent however denies that any execution attempts ever came to his notice as he does not know how and where the applicant obtained the various addresses where execution was attempted. See par 8 on p 100.

[9] The court derives its jurisdiction in matters of kind due to the provisions of **section 149 of the Insolvency Act, Act 24 of 1936** as amended, hereafter referred to as the "act".

[10] The provisions of section 149 is the following:

> " *(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 orfor the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within thejurisdiction of the court; or*
>
> (b) *At any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried business within thejurisdiction of the court;...*

[11] The question to answer is whether the respondent falls within the wording of section 149 at the time of the lodging of the application by the applicant for the sequestration of the estate of the respondent. The application was first date stamped by the office of the Registrar of this court on 17 September 2013. Service could not be effected in the normal way as the respondent was no longer at any of the then known addresses. Service by publication was ordered as per court order on p 75 and 77, the last dated 28 May 2014.

[12] One of the provisions of the court order dated 19 November 2013 was, in par 1.3 thereof, that *"a complete copy of the sequestration application, in- cluding all annexures thereto, be scanned and dispatched via e-mail to the respondent 's e-mail address* From the contents of p 82 can be accepted that the application was e-mailed to the respondent on 18 August 2014. The respondent filed a notice of intention to defend on 19 August 2014, the reasonable inference that he received and accepted such service. See p 85.

[13] The 12 months referred to in section 149 of the Act determining the juris- diction of the court in sequestration proceedings for the lodging of the peti- tion can only be calculated with reference to when the petition, now appli- cation, was served on the respondent. In terms of the provisions of The Petition Proceedings Replacement Act 35 of 1976 in section 1, the only possible meaning can be that any reference in any law to the institution of application proceedings in any court by petition, shall be construed to be the Institution of such proceedings by notice of motion in terms of the Rules. Rule 6(2) of the Uniform Rules of Court requires proper notice of such application to be addressed to both the registrar and the other person in- volved to be proper service.

[13] If this service is accepted as the date of service on the respondent, the cal- culation of the 12 month period required in section 149 of the Act would have commenced on 18 August 2013 (12 months prior to the service by way of e-mail on 18 August 2014).

[14] The ***Windeed*** search annexed by the applicant as annexure **"CSR-1"** on p 124 & 125, on p 125 indicates a certain Robbertze W C to be the owner of the property in Erasmuskloof during 2013. It is therefore possible that the respondent was no longer the owner of the said property during 2013, the 12 months preceding the service of the application as set out above. On this ground it is therefore not possible to find that this court has jurisdiction to hear the application.

[15] Section 149 however vests this court with jurisdiction in those instances where the debtor was *carrying on business* within the jurisdiction of the court at the date of the lodging of the application or at any time within twelve months preceding the lodging of the application.

[16] Sufficient facts should be stated in the application to show that the court has jurisdiction by the applicant. The onus is on the applicant to prove prima facie that the respondent was ordinarily carrying on business within the court's jurisdiction. Should the respondent challenge the prima facie evi- dence alleged by the applicant, the burden is then on the respondent to prove the contrary. See **Mars, The Law of Insolvency in South Africa, Juta 1988** on p 17.

[17] The respondent, although he avers to be unemployed, also mentions that he, likewise when the settlement agreement was entered into, is busy with the listing of a company named *Decision Limited.* See par 7 on p 99.
On p 101 in par 8.2 the respondent indicates that the listing is still in progress and soon to be completed. The annexure "B" on p 105 refers to a company named *Decillion Limited, to be renamed Ardor SA Limited.*

[18] It is important to note that the settlement agreement was signed on 8 November 2012. See copy of the agreement on p 28-29. The opposing affidavit was signed on 28 October 2014, almost two years after the settlement agreement was signed.

[19] The only reasonable inference from the above is that the respondent is on an ongoing basis busy with the listing of the company for almost two years.

[20] Section 149 of the Act vests a court with jurisdiction inter alia where a debtor *is carrying on business within the jurisdiction of the court within twelve months preceding the lodging of the application.* It is not necessary that the carrying on of the business was for the full extend of the twelve months, it is enough if he has he done so during such period. See **Mars,** supra on p 17.

[21] The above almost two years of involvement by the respondent to list the company in my view can only be regarded to be *carrying on business* within the jurisdiction of this court. The respondent is not casually involved in the listing but devoting substantial time to this activity, thereby vesting this court with jurisdiction in terms of section 149 of the Act.

[22] In his e-mail dated 4 January 2013 (annexure "CS-15" on p 49), clearly states that he will be back in Pretoria soon still involved in the listing of the company. In my view it is reasonable to infer that the respondent, although *"unemployed"* , is occupied with the listing of the company. This activity, on his own version, takes place within the jurisdiction of this court. He may be residing in Cape Town, but nothing precludes him to be ordinarily carry- ing on business in Pretoria- as he on his own accord will be back in Pretoria within a week.

[23] In the *Windeed* search on p 55 the respondent is listed as an *active director* of at least 10 listed companies with registered addresses in Gauteng within the jurisdiction of this court. The reasonable inference to be drawn from this is that the respondent was ordinarily carrying on business within the jurisdiction of this court within the twelve months preceding the lodging, and service of the application on 18 August 2014.

[25] I am satisfied that the respondent's ongoing involvement in the listing of the company is not a once of involvement, similar to "ordinary residence" in Phillips v Commissioner of Child Welfare, Bellville 1956(2) SA 330 (C), but something more prolonged than a temporary carrying on of business.

[26] The next question to be answered is whether it will be to the advantage of creditors should the estate of the respondent be sequestrated? 'Creditors' means all or at least the general body of creditors. The applicant in the founding affidavit in par 7 listed several other creditors of the respondent known to the applicant. It is difficult for a creditor to obtain full knowledge of the debtor's financial affairs, but from the information listed it is clear that the respondent indeed has other creditors.

[27] The respondent however chose not to be frank with the court but chose to have the court believe that he is unemployed. This is with respect not true. The respondent on his own version is ongoing involved in the listing of a company for an extended time of two years. He is actively involved in other companies but failed to inform the court to what extend his involvement is. He merely brushes the allegations aside in the opposing affidavit but fails to annex any prove of alleged deregistration of the involved companies or that the companies are dormant. He in one sentence in par 8.6 on p 102 merely denies any advantage to creditors. The respondent, in view of the proven allegations by the applicant, had to prove the contrary. See **Mars, supra p 17**.

[28] I am satisfied that the facts placed before the court is sufficient to have reason to believe that the sequestration will benefit the creditors, that some pecuniary benefit will result to the creditors. See **Meskin & Company v Friedman** 1948(2) SA 555 (W) at 588; **Amod v Kahn** 1947(1)SA 150 (N); **BP Southern Africa (Pty) Ltd v Furstenburg** 1966(1) SA 717 (0) on 720. Also see **Hockley's Law of Insolvency, 6th ed 31-33**.

[29] There has been compliance with the required formalities as to service on the Master's Office and on The South African Revenue Service. See p 4. The necessary security was tendered as per certificate on p 72.

[30] I am satisfied that the applicant has made out a case for the relief sought in the notice of motion and the following order is made:

30.1. The estate of the Respondent is placed under provisional sequestration;

30.2. The respondent and any other party who wishes to avoid such order being made final are called upon to advance the reasons, if any, why the court should not grant a final order of sequestration of the said estate on the 22 February 2016 at 10:00 or as soon thereafter as the matter may be heard.

30.3. This order be published in the Government Gazette; and Citizen

30.4. That the costs of the application be costs in the sequestration.

_____

HOLLAND-MÜTER AJ

_____

BY ORDER OF COURT

REGISTRAR

Date heard: 17 November 2015

Appearances:

Applicant's Counsel: Adv C Richard.

Respondent's Counsel: Adv C Spangenberg.