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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

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

CASE NO :25317/2018

31/5/2019

In the application between -

**HALOCURE (PTY) LIMITED**  
**(Registration No. 2010/020569/07)**

Applicant

and

**PHILLIPUS JACOBUS MOSTERT**  
**(ID No. [.....])**

Respondent

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**JUDGMENT**

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STRYDOM AJ

- [1] On 17 July 2018 the respondent's estate was placed under provisional sequestration with return date on 12 November 2018. All interested parties were called upon to show cause, if any, on this return date why the respondent's estate should not be placed in final sequestration.
- [2] Al Mayya International Limited (BVI) filed an intervention applicant (hereinafter referred to as the first intervening applicant) to be heard on the



return day. By 12 November 2018, the return date, a further party filed an intervention application. This application on behalf of Valley of the Kings (Pty) Ltd (second intervening applicant) became opposed and by agreement between the applicant, the first intervening applicant and the second intervening applicant as well as the respondent, a draft order was made an order of court in terms of which the first intervening applicant was granted leave to intervene. The parties agreed as to time periods for the filing of the respondent's opposing affidavit in the sequestration application, further affidavits in the second intervening applicant's application and to the filing of heads of argument. The return day in the sequestration application was extended to 3 April 2019. On this date the return date was further extended to 20 May 2019 when this matter was heard.

- [3] The respondent failed to file heads of argument on or before 12 April 2019 as per the court order. At the hearing of this matter there was also no appearance for the respondent in the sequestration application. Although a full set of affidavits were filed in this application, it became unopposed before this court.
- [4] The applicant and the first intervening applicant individually have proven the three requirements to obtain a final liquidation order. Both the applicant and the first intervening applicant have proven a claim as envisaged in section 9(1) of the Insolvency Act 24 of 1963. They have shown that the respondent has committed an act of insolvency or is factually insolvent. This nulla bona returns were issued when the applicants wanted to execute against their taxed cost orders obtained against the respondent. The applicants have shown that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate was sequestrated. The other formal requirements for a final sequestration were met.
- [5] The only defence which was put up by the respondent was that the respondent's costs tender, annexed to the founding affidavit, and the taxation of that tendered cost that resulted in the allocator, did not qualify as a court order, and/or is not equivalent to a court order to pay costs, and



therefore, the applicant could not proceed by means of a warrant of execution to recover the taxed costs. This defence is without merit as a tender to pay costs shall have the effect of an order of court for such costs.

- [6] Consequently the provisional order granted on 17 July 2018 should be made final and costs of the application should be ordered to be costs in the sequestration.
- [7] As far as the second intervention application is concerned there was also no appearance for the second intervention applicant and the court already dismissed this application ordering that Valley of the Kings (Pty) Ltd, should pay the costs jointly and severally, the one paying the other to be absolved, with the deponent to the founding affidavit, Thomas Hendrick Samons. Considering that the court made a costs order not only against the second intervening applicant but also against Mr Samons, the court will briefly provide reasons for this order.
- [8] The applicant filed its opposing affidavit to the second intervening application as per the court order, on 3 December 2018. The first intervening creditor filed its opposing affidavit to the second intervening application in terms of the court order. The second intervening applicant then failed to file a replying affidavit to the applicant. On or about 3 December 2018 the first intervening applicant (the second respondent in the second intervening application) filed a notice in terms of Uniform Rule 7(1) whereby it disputed the authority of DLBM Attorneys Inc to act on behalf of the second intervening applicant, i.e. Valley of the Kings (Pty) Ltd in the intervention application. No proof of authority was filed and there was also no appearance on behalf of the second intervening applicant when this matter was heard before this court.
- [9] As stated, the second intervening applicant never filed a replying affidavit and the application was not pursued before this court and was accordingly dismissed.
- [10] Thomas Hendrick Samons described himself in the founding affidavit in the second intervening application as a business rescue practitioner of the second intervening applicant. This provided him with locus standi to file



this application. According to his affidavit the beginning of business rescue proceedings was signed on 4 December 2017 and was issued by CIPC on 6 December 2017. The first intervening applicant filed an affidavit opposing the second intervening applicant's application. In this affidavit it was pointed out that at the time when Samons deposed to the founding affidavit in the second intervening application, Valley of the Kings (Pty) Ltd was no longer in business rescue. Accordingly, Samons was no longer the business rescue practitioner of Valley of the Kings (Pty) Ltd when he filed his affidavit. Samons has failed to make any averment or to provide any supporting evidence by the directors of Valley of the Kings evidencing that they have validly resolved to institute the second intervening application and that the institution of the proceedings was properly authorised and validly instituted and that the directors of Valley of the Kings have decided to appoint DLBM Attorneys Inc to represent Valley of the Kings for this purpose.

[11] What is stated hereinabove is the unchallenged version of the respondent in the opposed second intervening application which this court must accept. No replying affidavit was filed and it remains unclear whether Samons had the necessary authority to represent Valley of the Kings. This is the reason why the court ordered that Samons should jointly and severally with Valley of the Kings be responsible for the cost of the parties which oppose this second intervention application. The respondents argued for a punitive cost order. In my view it is justified. The second intervention application was nothing less than a stratagem to delay the final liquidation order. This resulted in an application running into close to 500 pages, just to be abandoned when the matter should have been heard.

[12] The following orders are made:

(a) In the sequestration application -

(i) The respondent is finally sequestrated.

(ii) The costs of the sequestration application will be



costs in the sequestration.

(b) In the second intervention application.

(i) The second intervention application is dismissed.

(ii) The second intervening applicant and Thomas Hendrick Samons, the deponent to the founding affidavit in the second intervening application, are ordered to pay for the costs of this application jointly and severally, the one paying the other to be absolved, on the scale of attorney and own client.

Date heard: 20 May 2019

Date delivered: 31 May 2019 at 10h00

Counsel for applicant: Adv G. F. Heyns

Counsel for intervening creditor: Adv C. Cutler