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

CASE NO: 24222/2021
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

VILCOR ENTERPRISES CC Applicant
(Registration No. 1985/005929/23)

and

KYLEE BURNETT Respondent
[…]
(Unmarried)

The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 8 July 2021.

TEFFO, J:

Introduction

[1] This is an urgent application for the provisional sequestration of the estate of the respondent.

[2] The application is opposed.

The parties

[3] The applicant is Vilcor Enterprises CC and the respondent is Ms Kylee Burnett.

Background

[4] During 2013 the applicant instituted an action against the respondent in this division under case number 58581/13 for payment in terms of a building agreement concluded between the parties for the building of the immovable property of the respondent in the Wild Teak development.

[5] The respondent defended the action. The issues in the action were separated in terms of Uniform Rule 33(1). The separated issues were heard and the court ruled in favour of the applicant. The respondent was ordered to pay the applicant's costs. The action is still pending.

[6] Costs were taxed in the amount of R826 331,60. The applicant managed to collect an amount of R454 516,20 from the respondent's funds which were held by her erstwhile attorneys of record, Natalie Visagie Inc. This amount reduced the total amount taxed of R826 331,60 to an amount of R371 815,40.

[7] On or about 8 December 2020 the applicant caused a writ of execution to be issued out of this Court. The writ was re-issued on 15 February 2021 and executed on 12 April 2021.

[8] On 12 April 2021 the applicant's attorney, Mr Stuart, received a telephone call from Advocate Ogunrombi who advised him that he was acting on behalf of a certain third party who allegedly owned the movable properties at the respondent's residence. The details of the said third party were not disclosed to Mr Stuart. Advocate Ogunrombi requested that the movables only be attached and not be removed to enable him to furnish Mr Stuart with proof that they were no longer being owned by the respondent. Mr Stuart did not receive the proof of payment.

[9] On the same day the sheriff went to the respondent's residence and demanded payment to satisfy the writ of execution. The respondent informed him that she was unable to satisfy the said warrant or any portion thereof. The sheriff then proceeded to perform a diligent search of the premises, judicially attached and removed the movable goods found at the premises.

[10] The attachment and removal of the movable goods were concluded on 13 April 2021 and a sale in execution was scheduled to take place on 19 May 2021.

[11] On 12 May 2021, Mr Yakopi of Zintle Nkhulu Inc contacted Mr Stuart telephonically. Mr Yakopi informed Mr Stuart that he was acting on behalf of Mr

Westernberg, a foreign national of the Netherlands. Mr Westernberg purchased the respondent's immovable property together with the movable properties contained therein. Mr Yakopi subsequently sent Mr Stuart an email confirming their telephone conversation together with proof that the immovable property was transferred into the name of Mr Westernberg on 16 April 2021. The immovable property was sold for an amount of R1 128 000,00. Furthermore, a copy of the deed of sale was also attached in terms whereof Mr Westernberg purchased the movable properties of the respondent for the amount of R214 684,00.

[12] Mr Yakopi threatened the applicant with an urgent application to interdict the sheriff from proceeding with the sale in execution of the movable properties under attachment and/or to claim their return.

[13] The sale of the properties by the respondent to Mr Westernberg prompted the applicant to bring an urgent application for the sequestration of the respondent's estate.

Urgency

[14] The applicant contends that it only became aware of the identity of Mr Westernberg on 12 May 2021 when Mr Yakopi furnished Mr Stuart with a copy of the deed of sale. This was the first day it became aware of the sale of the immovable property.

[15] In terms of section 29(1) of the Insolvency Act, 24 of 1936 as amended ("*the Act*"), the aforesaid dispositions of property by the respondent were done prior to the sequestration of her estate and this may have the effect of preferring one of her creditors above another.

[16] If the dispositions had such effect and were made within six months before the date of sequestration, and immediately after they were made the liabilities of the insolvent exceeded the value of her assets, the court may set them aside.

[17] The disposition of the movable properties allegedly took place on 22 January 2021. Any order of sequestration granted after 21 July 2021 would deprive the trustees of the insolvent estate of the remedy afforded to them in terms of section 29 of the Act.

[18] The applicant is not able to approach the court in the normal cause as no motion court dates are available before 21 July 2021.

[19] There is also an urgent need to stop the respondent from disposing any other properties.

[20] The court is also requested to adjudicate the matter on an urgent basis to prevent the *concursus creditorum* from suffering any further prejudice.

[21] The respondent denies that the application is urgent. She claims that where the court finds that there is urgency, the urgency is self-created. It was submitted that the applicant was aware that the movable properties were sold and owned by someone else as early as 12 April 2021. The applicant did nothing until on 17 May 2021 when it launched the application. The applicant has not explained why it took 34 days to launch this application when it had knowledge that the movable properties had been disposed of.

[22] The applicant conceded that its attorney received information about the sale of the movable properties that belonged to the respondent on 12 April 2021. However, the details as to who purchased or owned the movable properties and/or the person's attorneys of record at the time, were not disclosed to its attorney, Mr Stuart. It was only on 12 May 2021 that full details about the sale and the ownership of the movable properties were provided to its attorney. The information also included the fact that the immovable property was also sold to Mr Westernberg. It could not have approached the court for relief with sketchy information.

[23] I accordingly ruled that the matter was urgent.

Applicable legal principles

[24] An application in an application for the provisional sequestration of a respondent needs to satisfy the court on a *prima facie* basis that:

24.1 It has a claim against the respondent;

24.2 The respondent has committed an act of insolvency or is in fact insolvent; and

24.3 There is reason to believe that it will be to the advantage of the creditors if the estate of the respondent is sequestrated[1].

[25] De Waal AJ in *Standard Bank of South Africa Ltd v Sauer and Another*[2], remarked as follows:

"*4. Given that sequestration applications deal with the status of a person, the bar for obtaining a provisional order is set somewhat higher than that which applies in applications for interim interdictory relief. The question of whether the requirements are met on a prima facie basis is determined by assessing whether the balance of*

[1] Section 10 of the Insolvency Act 24 of 1936

[2] Case No. 18273/2018 unreported (Judgment handed down on 12 March 2019 in the WC division)

probabilities on the affidavits favour the applicant's case[3]*. The test can be traced back to the well-known judgment of Corbett JA (as he then was) in Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (A). In that matter, Corbett JA held that a court can hardly decide an application for provisional winding up of a company without reference to the respondent's rebutting evidence. Corbett JA then explained that the term 'prima facie case' means that the balance of probabilities on all the affidavits should favour the granting of the application for provisional liquidation (or sequestration)*[4]*.*

Applications for the referral of the matter to oral evidence will only be granted in exceptional circumstances in these applications because the granting of the relief does no lasting injustice to the respondent as she will on the return day generally be given an opportunity to present oral evidence on disputes issues[5]*.*

5. As far as the first requirement is concerned, i.e. whether the applicant has a claim against the respondent, the SCA added in Kalil that an application for liquidation should not be resorted to in an attempt to enforce a claim which is bona fide disputed. In respect of this requirement, the onus on the respondent is not to show that she is not indebted to the applicant but she must merely show that the indebtedness is disputed on bona fide and reasonable grounds[6]*. This is known as the Badenhorst rule*[7]*. In short, an application for provisional sequestration should not be used as a means of putting pressure on the respondent to pay a debt which is bona fide disputed.*"

The applicant's claim

[26] Two questions arise. 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. Should this question be answered in the affirmative, the second question is whether the applicant's claim has been shown by the respondent to be *bona fide* disputed on reasonable grounds, in which case sequestration proceedings would be regarded as inappropriate[8].

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[3] *Investec Bank Ltd v Hugo Amos Lambrechts N.O. & Others* Case Number 6570/2014 (unreported judgment handed down on 27 November 2014)
[4] *Kalil* at 979A
[5] *Kalil* at 979B
[6] *Kalil* at 980B-D
[7] With reference to the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348B
[8] See, for example, *Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening) 1998 (2) SA 220 (C) at 218D-219H*

[27] The applicant alleges that the respondent is indebted to it in the sum of R371 815,40 excluding additional costs of the writ and the sheriff. The respondent contends that amount allegedly being owed by her to the applicant is vague. It does not sufficiently inform her how much she owes to the applicant. She claims that the fact that the applicant has attached, removed and sold the movable properties from her house at an auction on 19 May 2021 raises questions that pertain to the amount allegedly owed to the applicant. It is submitted that the amount realised at an auction cannot be validly set off against the amount of the debt that the applicant holds against her. The movable properties which were sold at an auction did not belong to her. They were unlawfully seized and sold. The owner of the properties has sued the applicant for the recovery of the amount for the value of the goods which was R214 684,00. Should the amount realised at the auction for the sale of the movable properties be set off against the debt of the applicant, how much is it, and how was it calculated considering the other costs attendant thereto.

[28] The respondent asserts that the applicant has launched this application to put pressure on her to pay a debt which is *bona fide* and reasonably disputed. The applicant pretends to be acting in the interest of the *concursus creditorum* while in actual fact it is interested in debt collection for itself.

[29] The above allegations are denied by the applicant in the replying affidavit. It is asserted that a taxed bill of costs represents a liquidated claim that has been fixed. It was submitted that the respondent does not seriously dispute the amount owing. She merely claims that she is not certain as to whether the amount realised at the auction on 19 May 2021 ought to be deducted from the amount owing by her. Despite this uncertainty the amount owing is capable of easy and speedy proof. Should the movable properties not belong to her, the amount due and owing to the applicant remains R371 815,40. Should the goods have belonged to her, the amount due and owing to the applicant is R365 793,84 (R371 815,40 – R6 021,56).

[30] The applicant has attached the judgment in its favour against the respondent to its founding papers, the taxed bill of costs together with proof of payment from the respondent's erstwhile attorneys, Natalie Visagie Inc in the amount of R454 516,20 which reduced the taxed amount to the amount of R371 875,40. I agree with the applicant that a taxed bill of costs represents a liquidated claim that has been fixed.

[31] The applicant's attorney of record, Mr Stuart filed a supplementary affidavit, to which the sheriff's return was attached, explaining what happened to the proceeds of

the sale of the movable goods attached, and removed from the respondent's residence on 12 April 2021.

[32] It was submitted in the respondent's heads of argument that there is no explanation why the attorney could supplement an affidavit of a litigant. The supplementary affidavit should not be admitted. I do not agree. The applicant's attorney has been instructed to represent the applicant in the matter. He has personal knowledge of what happened to the proceeds of the sale as advised by the sheriff. All what the affidavit seeks to do is to attach the sheriff's return to confirm what has already been averred in the replying affidavit. There is no prejudice to the respondent. I admitted the supplementary affidavit in the interests of justice.

[33] Whether or not the movable goods will be set off against the debt of the applicant, is immaterial. There is not much difference in terms of the amounts. The fact of the matter is that this does not extinguish the debt due and payable to the applicant. The debt exceeds an amount R100,00 as envisaged in section 9(1) of the Act.

[34] In my view, on a balance of probabilities, the applicant has established its claim against the respondent and the respondent has not demonstrated a *bona fide* dispute on reasonable grounds.

Insolvency

[35] The applicant alleges that the respondent committed acts of insolvency as contemplated in section 8(b) of the Act when (a) she informed the sheriff that she was unable to satisfy the applicant's warrant and (b) the sheriff was unable to find movable properties to satisfy the warrant. Furthermore, as contemplated in section 8(c) of the Act when she disposed of her property which has and could have the effect of prejudicing her creditors or of preferring one creditor above another. It is averred that the respondent is deemed to be unable to pay her debts and is therefore liable to be sequestrated. The applicant contends that the value of the movable properties allegedly sold to Mr Westernberg is not sufficient to satisfy its claim against the respondent. It denies that the alleged sale of the movable properties between the respondent and Mr Westernberg took place, alternatively, that their market value was as stated in the deed of sale.

[36] With regard to factual insolvency, the applicant contends that the respondent does no longer own any immovable, movable or disposable property. Since January

2021, the respondent claims to have received the amount of R1 342 684,00 from Mr Westernberg. However, she does not have any money to pay its debt.

[37] The respondent denies the allegations. She claims that she can pay her debts as and when they fall due. She blames her erstwhile legal representative for not communicating the legal process leading up to judgment to her. The last she knew of the matter was that there was an application for leave to appeal the judgment against her. From there she never heard from her erstwhile attorney until the sheriff attended to her residence with a writ of execution to attach and remove the movable properties. She has not received a proper notice of taxation and/or a notice to execute the movable properties.

[38] She asserts that she is employed and earns a salary of R54 500,00 per month and has two other creditors with whom she is in good standing. One of her creditors, Nedbank, has offered her more credit. She contends that she would be able to negotiate an adequate amount of instalments to liquidate the capital debt owed to the applicant. The applicant refuses to engage her on making arrangements for the proper satisfaction of the debt due (even though it remains vague to her). She claims that if the applicant was open to arranging a liquidated amount of instalment payment, she would be able to pay her debts as and when they fall due. She denies having received the amount for the sale of the immovable property from Mr Westernberg. She contends that the amount was received in trust by the transferring attorney.

[39] In its replying affidavit, the applicant denies that the respondent is solvent. It is contended that the respondent's salary is not sufficient to pay the total debt in a single payment. She has not settled its claim nor attempted to do so. She has admitted that she cannot pay the applicant's claim or any portion thereof and that she does not own any assets.

[40] In *De Waard v Andrew and Thienaus Ltd*[9], Innes CJ remarked as follows:

"*… Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.*"

[9] 1907 (TS) 727 at 736

[41] Section 8 of the Act reads as follows:

"*Acts of insolvency*

A debtor commits an act of insolvency –

(a) …

(b) 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.

(c) If he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or preferring one creditor above another."

[42] The respondent could not satisfy the amount that was demanded from her when the sheriff executed the writ at her residence. She disposed of her property which has or could have the effect of prejudicing her creditors or of preferring one creditor above another. I am satisfied under the circumstances that the respondent has committed acts of insolvency as envisaged in section 8(b) and (c) of the Act.

Advantage to creditors

[43] The applicant contends that upon the order for the sequestration of the respondent being made, the affairs of the respondent can be investigated by a trustee to establish what assets, voidable preferences or dispositions without value exist to the advantage of creditors. Further that should the sale of the respondent's immovable property be set aside, that will be to the benefit of the *concursus creditorum*.

[44] The applicant has attached a valuation report which shows that there is equity in the immovable property as the property has a municipal valuation of R2 000 000,00. It is submitted that this amount far exceeds the amount previously due to the respondent's bondholder and a trustee will be able to ensure that the respondent's property is realised for its true value, and that the proceeds are distributed *pro rata* amongst the respondent's creditors.

[45] It is submitted that the trustee can also investigate the circumstances giving rise to the alleged sale of the respondent's movable goods and determine whether monies were actually exchanged or, as the applicant suspects, the sale was merely a simulated transaction to avoid execution proceedings taking place. Furthermore,

the trustee will be able to investigate what happened to the balance of the amount of R1 342 684,00 allegedly received from Mr Westernberg after the bondholder had been paid, alternatively, whether further amounts changed hands between the respondent and Mr Westernberg.

[46] The applicant asserts that despite having liquidated her assets, the respondent does not intend to pay her creditors. It is only through the sequestration of her estate that her *concursus creditorum* can expect to obtain redress.

[47] The respondent reiterates that besides the applicant, she has other two creditors with whom she is in good standing. She will remain in good standing with them as she has the ability and will to make payments as and when they fall due. She claims that the respondent refuses to engage in a proper and mature fashion with a view to liquidate the debt in monthly instalments until final payment.

[48] She denies that the sequestration of her estate will be to the advantage of creditors. It is submitted that the sequestration of the respondent's estate will only benefit the applicant.

[49] The *onus* of establishing advantage to creditors remains on the sequestrating creditor throughout, even where it is clear that the debtor has committed an act of insolvency[10]. In certain earlier cases (e.g. *Wilkins v Pieterse*), the view was taken that once an act of insolvency (i.e. any act) is proved, the court will require convincing reasons to persuade it that sequestration will not be to the advantage of creditors. However, more recently, the courts have held that the commission of an act of insolvency is not necessarily material to the question of advantage to creditors. Certain acts of insolvency by their nature, tend to indicate advantage to creditors – for instance, a disposition of property which prejudices or prefers one creditor above another – but other acts, e.g., a *nulla bona* return, do not (see, e.g. *Lotzof v Raubenheimer*[11]).

[50] Sequestration will only be to the advantage of creditors if it will result in a greater dividend to them than would otherwise be the case – e.g., through the setting aside of impeachable transactions, or the exposure of concealed assets – or if it will prevent an unfair division of the proceeds of the assets or some creditors being preferred to others[12].

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[10] *Wilkins v Pieterse* 1937 CPD 165
[11] 1959 (1) SA 90 (O) 94
[12] *Gardee v Dhanmanta Holdings & Others* 1978 (1) SA 1066 (N) 1068-70

[51] In *Gardee v Dhanmanta Holdings & Others*[13], a debtor's only creditor applied to sequestrate his estate on the basis of a *nulla bona* return. The court held that the creditor had to satisfy it that there was reason to believe that, after the costs of sequestration had been paid, he would recover an amount that was not negligible. Furthermore, he had to demonstrate some reasonable expectation that the amount would exceed the likely proceeds of ordinary execution. As he had given no information other than that he had obtained a *nulla bona* return, he had failed to show that sequestration would be to his advantage (see also *Mamacos v Davids*[14]).

[52] The court does not have to be satisfied that sequestration will benefit creditors financially, merely that there is reason to believe that it will:

"*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 benefit will result to creditors*[15]*.*"

[53] The respondent claims that she does not longer own any movable or immovable property. It was not disputed that the sale of her immovable property had the effect of settling the amount due to her previous bondholder. From her own version, the respondent contended that she pays her other creditors while she failed and/or neglected to pay the applicant's debt.

[54] The applicant's evidence relating to the valuation of the immovable property has not been rebutted. The applicant submits that should the sale of the respondent's immovable property be set aside, that will be to the advantage of creditors as the municipal valuation of R2 000 000,00 exceeds the value of the bond previously registered over the property which was R1 304 000,00. Furthermore, that the sequestration of the respondent's estate will ensure that the immovable property and any other movable property she may possess, is realised for its true value and the proceeds thereof are distributed *pro rata* amongst the respondent's creditors.

[55] In my view, the acts of insolvency committed by the respondent indicate an advantage to creditors. I am satisfied that there is a reasonable prospect that some pecuniary benefit will result to the creditors. Under the circumstances, the applicant has discharged its *onus* of establishing that the sequestration of the respondent's estate will be to the benefit of the creditors.

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[13] *Supra*
[14] 1976 (1) SA 19 (C)
[15] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 558

Conclusion

[56] It therefore follows that a proper case has been made out for a provisional order of sequestration.

Costs

[57] The respondent sought costs *de bonis propriis* against the applicant's attorney of record for launching the application.

[58] Mr J Vorster made submissions against the costs order sought against the applicant's attorney by the respondent.

[59] I have found in favour of the applicant in this application. The issue of the *de bonis propriis* costs order against the applicant's attorney sought by the respondent does not arise. I am therefore not inclined to grant further costs in this application save for the costs in the sequestration.

[60] Consequently, an order is made in terms of the draft order marked "X".

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	C Richard
Instructed by	E Y Stuart Inc
For the respondent	N T Jongwana
Instructed by	Laäs Döman Inc
Heard on	2 June 2021
Handed down on	8 July 2021